A

TAY KEONG KOK & ORS v. EASTMONT SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
SEE MEE CHUN JCA
B MOHD NAZLAN GHAZALI JCA
[CIVIL APPEAL NOS: B-02(NCC)(W)-1705-09-2021
& B-02(IM)(NCC)-666-04-2022]
26 JUNE 2024

C

Abstract – *(i) An action based on fraudulent trading, under s. 540 of the Companies Act 2016, can be brought in a separate suit and not necessarily in the winding-up proceedings or the proceedings against the company; (ii) Fraudulent trading can be discovered in the course of the winding-up process or in any proceedings against the company. The* D *winding-up of a company can, in fact, be considered as carrying on the business of the company with the intent to defraud creditors. The intent to defraud does not necessarily require incurring new debt; (iii) The individuals involved in fraudulent trading need not hold managerial positions in the company to be liable for fraudulent trading; (iv) An* E *agreement to injure another person can be inferred from overt acts and need not be express; (v) In certain circumstances, courts may disregard the separate legal personality of a company to hold its directors or shareholders personally liable.*

F

COMPANY LAW: *Fraudulent trading – Winding up – Creditor contracted with company for substructure works – Contract mutually terminated with company owing creditor monies for completed works – Creditor sued company to recover outstanding amount but discovered that company was wound up by another company – Discovery that company and other company were related with common* G *directors and shareholders – Whether there was fraudulent trading to avoid paying debts to creditor – Whether winding up of company orchestrated – Whether fraudulent trading must be discovered in winding up process or in proceedings against company – Whether business of company carried on with intent to defraud – Whether shareholders/directors/agents/nominees parties to carrying on of* H *business of company – Whether directors/shareholders/agents/nominees knowingly parties to carrying on of business of company with intent to defraud – Companies Act 2016, s. 540*

TORT: *Conspiracy – Conspiracy to injure – Fraudulent trading – Creditor contracted with company for substructure works – Contract mutually terminated* I *with company owing creditor monies for completed works – Creditor sued company to recover outstanding amount but discovered that company was wound up by other company – Discovery that company and other company were related with common*

directors and shareholders – Whether there was fraudulent trading to avoid paying debts to creditor – Whether winding up of company orchestrated – Whether there was conspiracy to injure creditor – Companies Act 2016, s. 540

CIVIL PROCEDURE: *Jurisdiction – Challenge – Creditor contracted with company for substructure works – Contract mutually terminated with company owing creditor monies for completed works – Creditor sued company to recover outstanding amount but discovered that company was wound up by other company – Discovery that company and other company were related with common directors and shareholders – Creditor commenced fraudulent trading suit against shareholders/directors/agents/nominees – Whether fraudulent trading suit must be brought in same winding up court or in same court in which company was sued by creditor – Companies Act 2016, s. 540*

By way of a letter of award ('LOA') in 2012, the respondent, Eastmont Sdn Bhd ('plaintiff') was appointed by Mega Planner Jaya Sdn Bhd ('Mega Planner') to carry out substructure works for a project involving, among others, the development of two blocks of condominium in Kuala Lumpur, for the contract price of RM26 million. The plaintiff's position was that, whilst it had undertaken the works as specified, the LOA was mutually terminated by the parties in December 2013. The plaintiff asserted that Mega Planner owed the plaintiff the amount of RM12,331,667.29 for the works done by the plaintiff, pursuant to the LOA. A number of years later, just before the statute of limitation had set in, the plaintiff instituted a suit ('Suit 51') at the High Court, for the recovery of the said sum. Upon service of the writ on Mega Planner, the plaintiff discovered that Mega Planner had been wound up in 2019 at the instance of a petition filed by Dakota Engineering Sdn Bhd ('Dakota Engineering'). This petition was preceded by a suit commenced by Dakota Engineering against Mega Planner in 2018 for which a judgment in default ('JID') was entered against Mega Planner. This JID was the basis of the winding up status of Mega Planner, the plaintiff, having sought and successfully obtained leave of the winding up court to commence an action against Mega Planner, proceeded with its Suit 51 and successfully obtained a JID against Mega Planner for the sum of RM10,050,819.57 as arrears due under the final statement of account. After securing the JID, the plaintiff discovered that Dakota Engineering and Mega Planner were related concerns and shared common directors and/or shareholders (and/or ultimate controllers). Additionally, the appellants ('defendants') were the directors and/or shareholders of either Mega Planner or Dakota Engineering or common to these entities. This led to the plaintiff filing a suit in the High Court, contending that the defendants had jointly and/or severally: (i) carried on the business of Mega Planner with the intention of defrauding the plaintiff by winding up Mega Planner through Dakota Engineering in order to avoid the payment of debts to the plaintiff, therefore contravening s. 540 of the Companies Act 2016 ('CA 2016'); and (ii) conspired to injure the plaintiff by orchestrating the winding up of Mega Planner. After a full trial, the High

A Court allowed the plaintiff's claims on the grounds that: (i) there was an intent to defraud on the part of Mega Planner and Dakota Engineering based on, among others, (a) the admission by the third defendant that the defendants were aware of the debts due from Mega Planner to the plaintiff since 2014; (b) the admission by the second defendant that Mega Planner was wound up B to avoid paying any debts to the creditors; (c) that Dakota Engineering and Mega Planner were related companies as admitted by the first and third defendants; and (d) the testimony of the first and third defendants who, despite not holding the position as directors of Mega Planner, decided not to defend the Dakota Engineering's claim against Mega Planner as they had found there were no merits in defending the same and thus letting the JID C be entered against Mega Planner; (ii) in the absence of any documentary evidence to support the validity of the claim by Dakota Engineering against Mega Planner, an adverse inference could justifiably be drawn against the defendants. In any event, the purported debts owed by Mega Planner were not reflected in Dakota Engineering's financial statements, as also admitted D by the first defendant, and neither did Mega Planner record any financial problems at the time when it was wound up; and (iii) the defendants had used Dakota Engineering and attempted to intervene in the plaintiff's leave application to sue the wound-up Mega Planner. The sixth defendant had even affirmed the affidavit in support to intervene pursuant to the instruction given E by the first defendant. It was determined that the first and third defendants were the controlling minds of Mega Planner and Dakota Engineering. The High Court had also awarded the plaintiff general damages of RM269,280.34 and exemplary damages of RM10,000. Hence, the present appeal by the defendants. The issues that arose were: (i) whether the fraudulent trading suit F must be brought in the same winding up court or in the same court in which Mega Planner was sued by the plaintiff; (ii) whether the fraudulent trading must be discovered in the winding up process or in the proceeding against the company; (iii) whether the winding up of a company could amount to the carrying on of the business of the company with the intent to defraud; (iv) whether the business was carried on with intent to defraud if the plaintiff G did not show Mega Planner incurred debt at the material time; (v) whether the plaintiff should have pleaded fraudulent trading was committed in 2012 when the debt was incurred; (vi) whether the business of the company was carried on with the intention to defraud; (vii) whether 'intent to defraud' must show dishonesty; (viii) whether s. 540 of the CA 2016 required the H defendant to hold managerial positions in Mega Planner to be carrying on its business with intent to defraud; (ix) whether evidence showed that the defendants were involved in the carrying on of the business of Mega Planner to defraud the plaintiff; (x) whether the defendants were knowingly parties to the carrying on of the business of Mega Planner with intent to defraud; I (xi) whether the plaintiff was a creditor of Mega Planner; (xii) whether there was an agreement; (xiii) whether it was lawful/unlawful means conspiracy; and (xiv) whether the conspiracy injured the plaintiff.

Held (dismissing appeal; affirming decision of High Court)
Per Mohd Nazlan Ghazali JCA delivering the judgment of the court:

(1) In order for the court to invoke s. 540 of the CA 2016, it was unnecessary for the present suit to have been instituted in either the winding up court or in any proceedings against the company, such as in the court which heard the matter against Mega Planner in Suit 51, and for which the JID had been obtained by the plaintiff against the company. The plaintiff was perfectly entitled to file a separate action against the directors or other persons, as the High Court in this instant case was vested with the jurisdictional authority under s. 540 to hear and decide on the instant suit. This position was also in congruence with the very objective of s. 540 of the CA 2016. The overriding objective of the provision was to allow the corporate veil to be pierced, representing a crucial departure from the well-entrenched principles of limited liability and separate corporate legal personality. This, in turn, meant that once fraudulent trading is established, there would then be personal responsibility on the part of any person who was knowingly a party to the carrying on of such business with the intent to defraud, without any limitation of liability, for all or any of the debts or other liabilities of the company, as the court may direct. Whilst s. 540 can be engaged only 'in the course of the winding up of a company or in any proceedings against a company', this did not translate into a proposition that the fraudulent trading action against the alleged defaulters, like presently, must be pursued in the winding up court itself or in the same action taken against the company. (paras 49, 50, 56 & 57)

(2) Here, the plaintiff, as a creditor of Mega Planner, discovered the fraudulent trading in the process of the winding up of Mega Planner in the sense that it was after it had sued and obtained the JID against Mega Planner subsequent to the winding up of the company on the petition of Dakota Engineering. This was also after Dakota Engineering's unsuccessful attempt to intervene in the application by the plaintiff for leave to sue Mega Planner (which by then was already a wound-up company) which eventually led to the JID for the plaintiff against Mega Planner. All these may rightly be said to have occurred in the process of the winding up (or the liquidation) of Mega Planner. This was notwithstanding that the fraudulent trading could be the course of conduct concerning the winding up of the company itself. For it was still a matter discovered in the course of the winding up of the company. This, therefore, rendered the argument of the defendants that the plaintiff did not fulfil the second limb of s. 540 (in respect of 'in any proceedings against a company') inconsequential since the plaintiff had already plainly satisfied the first limb ('in the course of the winding up of a company'). In any event, there was no compelling reason to

A construe that the words in the second limb 'in any proceedings against a company' as requiring that the fraudulent trading must only be discovered in that proceeding against the company. This was because the claimant can, subsequent to that suit (against the company), like presently, initiate an action for fraudulent trading against the persons B who were knowingly party to the carrying on business with the intent to defraud (such as in this instant case, against the defendants). Thus, in this case, it could also be said that it was in that suit by the plaintiff (Suit 51) against Mega Planner (by then, already wound-up) where Dakota Engineering tried in vain to intervene in the preceding proceeding for leave by the plaintiff that provided the genesis for the C discovery of evidence leading to the allegation of fraudulent trading against the defendants, given the relationships amongst them, as well as *vis-à-vis* Mega Planner and Dakota Engineering. It was still within the scope of s. 540 if the discovery was made in the process of the winding up (after the granting of the winding up order) or subsequent to the D proceeding against the company, provided there was in the first place such a proceeding against the company which had subsequently led to the discovery. To put it another way, the key prerequisites or the *sine qua non* to the application of s. 540 of the CA 2016 *vis-à-vis* the words '(1) If in the course of the winding up of a company or in any E proceedings against a company it appears that any business of the company has been carried on with intent to defraud ...' is that it must be shown that the company in question has either been wound up (which is the case here) or that a proceeding has been taken against it (also the case presently). (paras 61-66)

F **(3)** How exactly could the winding up of Mega Planner be construed as a business of Mega Planner being carried on with an intent to defraud? The winding up of Mega Planner was, in the first place, not initiated by Mega Planner. It was petitioned by Dakota Engineering. The defendants were in the position of control over both Mega Planner and Dakota G Engineering. They were able to cause Dakota Engineering to initiate the suit and then to file the petition and later to apply to intervene in the leave application. At the same time, the defendants caused Mega Planner not to contest the suit which resulted in the JID nor resist the subsequent petition which led to the granting of the winding up order, H with the consequence of the avoidance of debt payment to the plaintiff as a creditor of Mega Planner, patently prejudicing the position of the plaintiff. It was such course of conduct which amounted to the carrying of the business of Mega Planner with the intent to defraud its creditors. (para 83)

I

(4) The contention of the defendants, on the point about the necessity of showing debts being incurred to sustain a claim under s. 540 of the CA 2016, was flatly contrary to the language of the provision itself. The grievance of the plaintiff was that the defendants were complicit in carrying on the business of the company with intent to defraud the plaintiff by orchestrating the commencement of the suit by Dakota Engineering against Mega Planner (both ultimately controlled by the defendants), the non-contest of the suit by Mega Planner which resulted in a JID against the company and the subsequent winding up of the company on the basis of the petition by Dakota Engineering (also not resisted by Mega Planner) founded on the said JID, which therefore successfully avoided the payment of debt owing by Mega Planner to the plaintiff. The essence of s. 540 of the CA 2016 to the instant case was to provide redress to a creditor, like the plaintiff herein, who, as a result of fraudulent trading, was denied of its rightful entitlement to the repayment of debt owing by the company. There was no necessity that the intent to defraud must involve the company incurring new debt. (paras 102, 105 & 106)

(5) There was no reason for the plaintiff to have raised a complaint in 2012 when the plaintiff only discovered the defendants' common control of Mega Planner and Dakota Engineering much later, which was after the plaintiff, in Suit 51, obtained the JID against Mega Planner in December 2019, which triggered the application of s. 540 of the CA 2016. The absence of this knowledge was also the reason why the plaintiff did not pursue its claim against Mega Planner immediately after December 2013 (the mutual termination) but only commenced the same after five and a half years, some six months before the statutory limitation set in. Mega Planner had been operating and carrying on business until the presentation of the winding up petition in 2019 by Dakota Engineering, and the winding up order was granted by the High Court in May 2019. In any event, this submission by the defendants was predicated on their stance that the fraudulent trading must involve the incurring of credit knowing it would not be repaid – hence, the focus on the point in time when the debt was incurred instead of the winding up process. This understanding of the law was erroneous. (paras 108-110)

(6) It was not necessary that, in the context of s. 540, the carrying on of the business with intent to defraud be in the form of incurring company debts (with the knowledge that the debts would not be repaid or there was a substantial and unreasonable risk that they would not be). Deliberately orchestrating the JID and winding up petition against Mega Planner, both uncontested by Mega Planner, would fall squarely within the scope of the essence of fraudulent trading which was the deprivation of an economic advantage from any creditor or the infliction upon the creditor of an economic loss. (paras 119 & 121)

(7) The element of intent to defraud with dishonesty, in s. 540 of the CA 2016, had been well made out by the plaintiff. Without any doubt, the instant case was crystal-clearly one where the business of the company had been carried on with intent to defraud creditors of the company, and not one simply where any creditor of the company had been defrauded in the course of carrying on the business of the company. The body of evidence on the involvement of the defendants could not lead to a conclusion other than that what had taken place was dishonest, according to the ordinary standard of reasonable and honest individuals and that the defendants themselves too had demonstrated their knowledge and realisation that the relevant conduct on their respective parts was, by those standards, dishonest. (paras 126 & 127)

(8) It was not necessary for the defendants to be involved in the managing of the business of Mega Planner for the plaintiff to sustain a case under s. 540 of the CA 2016. However, the defendants, specifically the first and third defendants were, in fact, in a controlling position in not only Mega Planner but also Dakota Engineering. The first and third defendants may be regarded as the ultimate controllers of both Dakota Engineering (by virtue of, among others, both being the current directors and shareholders of Temasek Teguh, the corporate shareholder who wholly owned Dakota Engineering) and Mega Planner (by virtue of, among others, the third defendant being both a director and shareholder of Vati Resources, the second defendant (the first defendant's spouse) being a director and shareholder of Pelantar Segar and the fourth defendant's involvement in Zentrico) whilst the second, fourth, fifth and sixth defendants were mere agents or nominees of the first and third defendants. Notwithstanding any argument of separate legal personalities and limited liability companies, since the evidence, uncontroverted and overwhelming, had shown that the first and third defendants were the controllers who were involved in managing the affairs of both companies, whilst their nominees had also participated in the fraud by enabling themselves to be the directors (and shareholders) of the relevant companies (and shareholder companies), in accordance with s. 540 of the CA 2016, the law permits the lifting of the corporate veil of Mega Planner with the consequence that all of them were to be personally responsible for their wrongdoing in commencing the suit against Mega Planner and then by winding up Mega Planner, both deliberately not resisted by Mega Planner, thus enabling Mega Planner to avoid its obligation to pay the debts owed to its creditor, the plaintiff herein. (paras (para 134, 149 & 154)

(9) Based on the above analysis of how the business of Mega Planner was carried on by the defendants with the intent to defraud, it had been shown, for all intents and purposes, that the defendants must surely have been knowing parties to the carrying of the business in the said manner.

In other words, since they were either the main controlling owners of the main entities, particularly Mega Planner, or nominees to the controlling owners, all of them must have had the knowledge of their involvement in the carrying of the business in such manner. Given the uncontroverted evidence of the relationships amongst the defendants, and *vis-à-vis* the companies, it was difficult not to find that the defendants were using Dakota Engineering and Mega Planner to wind up the latter, such that the plaintiff had therefore established its case of fraudulent trading against the defendants under s. 540 of the CA 2016. There was sufficient evidence to demonstrate that each of the individual defendants had the requisite knowledge in that they each knew or had at least turned a blind eye that in the execution of the orchestration of the winding up of Mega Planner, the business of the company was being carried on with the intent to defraud the characters. (paras 156, 161 & 173)

(10) There was no reason why the plaintiff was not a creditor of Mega Planner. It already had a pecuniary claim against Mega Planner for the remaining payment for works done following the mutual termination in December 2013 (as acknowledged by a number of the defendants) which the plaintiff could already have enforced its claim as a creditor against Mega Planner by an action of debt without the need to establish a finding of liability. Even better for the plaintiff, its claim in this case was, in fact and in law, premised on a JID obtained against Mega Planner, which judgment had never been set aside. This judgment was even placed in Part A of the common bundle of documents at the trial below – thus, its authenticity and contents were agreed to and not disputed. The High Court was clearly not plainly wrong in finding that the plaintiff's case of fraudulent trading against the defendants, under s. 540 of the CA 2016, had, on a balance of probabilities, been established. (paras 179-181)

(11) Evidence in respect of the claim under s. 540 of the CA 2016 had clearly shown that the defendants had conspired with each other to injure the plaintiff. It was an understanding, if not an agreement, amongst all that the second, fourth, fifth and sixth defendants, for all intents and purposes, acted according to the directions of the first and third defendants. These two were the mastermind behind the plan to wind up Mega Planner and, together with the other four, were knowingly parties to such carrying on of the business of Mega Planner by the course of conduct concerning the winding up process as the four had also allowed their names to be used to achieve the plan to wind up Mega Planner. In relation to the element for the agreement among conspirators, the agreement need not be express and may be inferred from overt acts, where several parties take steps towards one collective purpose, and where the participation in a conspiracy may be active or passive. The corporate structure and registered shareholding of Mega Planner and

Dakota Engineering were for this purpose used as a mechanism or a sham, and the tenet of separate legal entity abused, in order to avoid the detection of the true masterminds behind the entire charade to injure the plaintiff by denying its right to be paid the debt due to it from Mega Planner. (paras 185, 187 & 190)

(12) The predominant objective of the agreement in the defendants' conspiracy was to injure the interest of the plaintiffs, given especially the evidence on the pursuit of the JID in the winding up of Mega Planner, ensuring they were not resisted, including later attempting to intervene in the plaintiff's application for leave to take action against the wound-up Mega Planner, all with the knowledge of the defendants of the consequences of such course of action. All these, pointed inescapably to the presence of the intention to cause harm to the plaintiff as the main or predominant, if not sole reason for the conspiracy. Any argument that the decisions taken by the directors amongst the defendants to have been in the nature of business judgment and therefore protected was misconceived. They could not pass muster the requirements of s. 214 of the CA 2016 that the decisions concerning the JID and the winding up process and matters related thereto were made in good faith, for proper purpose, in the reasonable belief that they were appropriate and in the best interest of Mega Planner, and without any personal interest in the decisions, in order to benefit from the protection of the said statutory provision. (paras 198 & 199)

(13) The requirement for the plaintiff to have suffered loss and damage as a result of the conspiracy had been established. The plaintiff was owed a sum of money by Mega Planner. The plaintiff pursued its claim in the court and succeeded in obtaining a JID against Mega Planner. However, the plaintiff had not been able to achieve justice in getting paid by Mega Planner, and remained in its pursuit of the claim by instituting action against the true controlling parties of Mega Planner who were also in control of Dakota Engineering, and the other conspirators. The injury and loss to the plaintiff, still a creditor of Mega Planner, was as such could not be denied or subject to a real challenge. There was no insurmountable difficulty in showing that the defendants in an unlawful means conspiracy had acted with an intention to injure the plaintiff. Even though the defendants may contend that what they had done was for their own purposes, the element of the intention to injure could nevertheless still be found against them, since a loss to the plaintiff here was the unmistakable opposite to the gain for the defendants, in ensuring avoidance of payment by Mega Planner. It certainly could not be said that the High Court was plainly wrong in its finding of liability against the defendants for the tort of conspiracy to injure the plaintiff. (paras 200, 204 & 205)

(14) The award of damages by the High Court was not made in error and was essentially, in the circumstances of the case, sums that was reasonable, moderate and not excessive. (para 239)

Case(s) referred to:

ADS v. Brothers [2001] 2 BCLC 324 ***(refd)***

Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal [2016] 2 CLJ 563 CA ***(refd)***

Carman v. The Cronos Group SA & Others [2006] BCC 451 ***(refd)***

Chin Chee Keong v. Toling Corporation (M) Sdn Bhd [2016] 6 CLJ 666 CA ***(refd)***

China Idea Development Ltd v. Ooi Kee Liang & Ors And Another Case [2018] CLJU 1872; [2018] 1 LNS 1872 HC ***(refd)***

Coleman v. The Queen [1987] 5 ACLC 766 ***(refd)***

Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal [2016] 3 CLJ 676 CA ***(refd)***

Dato' Gan Ah Tee & Anor v. Kuan Leo Choon & Ors [2012] CLJU 734; [2012] 1 LNS 734 HC ***(refd)***

Dato' Prem Krishna Sahgal v. Muniandy Nadasan & Ors [2017] 10 CLJ 385 FC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Kris Angsana Sdn Bhd v. Eu Sim Chuan & Anor [2007] 4 CLJ 293 CA ***(refd)***

Lai Fee & Anor v. Wong Yu Vee & Ors [2023] 4 CLJ 1 FC ***(refd)***

Lama Tile (Timur) Sdn Bhd v. Lim Meng Kwang & Anor [2015] 3 CLJ 763 CA ***(refd)***

Lazarus Estates v. Beasley [1956] 1 All ER 341 ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v. Awang Soh Mamat & Ors [2009] 5 CLJ 1 CA ***(refd)***

Lonrho Plc v. Fayed [1992] 1 AC 448 ***(refd)***

Manifest Shipping Co Limited v. Uni-Polaris Insurance Co Limited (The Star Sea) [2001] UKHL 1 ***(refd)***

MD Biomedical Engineering (M) Sdn Bhd v. Goh Yong Khai [2021] 6 CLJ 30 CA ***(refd)***

Morphitis v. Bernasconi [2003] Ch 552 ***(refd)***

Mulcahy v. R (1868) LR 3 HL 306 ***(refd)***

New Zealand Shipping Co Ltd v. Société des Ateliers et Chantiers de France [1919] AC 1 ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd [2017] 5 CLJ 58 CA ***(refd)***

OBG Ltd & Others v. Allan [2007] UKHL 21 ***(refd)***

Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors [2021] 4 CLJ 821 FC ***(refd)***

Pendaftar Hakmilik Pejabat Tanah Dan Galian Selangor & Anor v. Lau Yong Ying [2020] 5 CLJ 164 CA ***(refd)***

Pentadbir Tanah Daerah Timur Laut, Pulau Pinang v. Yeoh Oon Theam [2017] 3 CLJ 557 CA ***(refd)***

Premium Vegetable Oils Sdn Bhd v. ICG Systems Sdn Bhd & Ors [2006] 7 CLJ 364 HC ***(refd)***

R v. Grantham [1984] 3 All ER 166 ***(refd)***

R v. Kemp [1988] 2 QB 645 ***(refd)***

R v. Siracusa [1990] 90 Cr App Rep 340 ***(refd)***

Re Augustus Barnett & Son Limited [1986] BCLC 170 ***(refd)***

Re Patrick And Lyon Limited [1933] Ch 786 ***(refd)***

Re Sarflax Ltd [1979] 1 All ER 529 ***(refd)***
Re William C Leitch Bros Ltd (No 1) [1932] 2 Ch 71 ***(refd)***
Rookes v. Barnard [1964] 1 All ER 367 ***(refd)***
Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2017] CLJU 500; [2017] 1 LNS 500 CA ***(refd)***
Siow Yoon Keong v. H Rosen Engineering BV [2003] 4 CLJ 68 CA ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor (No 2) [2010] 1 CLJ 419 FC ***(refd)***
Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor [1992] CLJU 7; [1992] 1 LNS 7 HC ***(refd)***
Tetuan Sulaiman & Taye v. Wong Poh Kun & Anor And Another Appeal [2023] 4 CLJ 699 CA ***(refd)***
The King And The Attorney-General Of The Commonwealth v. Associated Northern Collieries & Ors [1911] 14 CLR 387 ***(refd)***
Total Network SL v. HM Revenue And Customs [2008] 2 All ER 413 ***(refd)***
Tradewinds Properties Sdn Bhd v. Zulhkiple A Bakar & Ors [2019] 2 CLJ 261 CA ***(refd)***
Yap Boon Hwa v. Kee Wah Soong [2019] CLJU 1157; [2019] 1 LNS 1157 CA ***(refd)***
Yong Mok Hin v. United Malay States Sugar Industries Ltd [1967] CLJU 220; [1967] 1 LNS 220 FC ***(refd)***
Yong Toi Mee & Anor v. Malpac Holdings Bhd & Ors [2018] 5 CLJ 619 HC ***(refd)***

Legislation referred to:
Companies Act 1965 (repealed), ss. 217, 219(2), 223, 304(1)
Companies Act 2016, ss. 2, 4, 8(4), (5), 101, 136, 214, 217, 464(1)(b), 467(2), 472(1), 540(1), (5)
Contracts Act 1950, s. 17
Courts of Judicature Act 1964, s. 25
Evidence Act 1950, s. 114(g)

Companies (Winding Up and Miscellaneous Provisions) Ordinance [HK], s. 275(1)
Companies Act 1948 [UK], s. 332
Companies Act 2006 [UK], s. 993
Insolvency Act 1986 [UK], s. 213

For the appellants - M Rajenthirakumar R Malaiapan, Moses Pillai R Susayan & Hiu Yeat Fong; M/s Kumar Assocs
For the respondent - Marcus Tan Seng Peng & Eunice Kwong Sook Wen; M/s Ricky Tan & Co

[Editor's note: For the High Court judgment, please see Eastmont Sdn Bhd v. Tay Keong Kok & Ors [2022] CLJU 456; [2022] 1 LNS 456 (affirmed).]

Reported by Lina E

JUDGMENT

Mohd Nazlan Ghazali JCA:

Introduction

[1] This appeal arises from the decision of the High Court, which allowed the respondent's claim of fraudulent trading under the Companies Act 2016 and of the tort of conspiracy to injure against the appellants (the defendants at the High Court).

[2] When a company is wound up, its creditors will take steps to recover their money. However, it is usually the case that there would be insufficient remaining assets of the company to ensure full repayment. In such situation, the creditors will try to achieve repayment by extracting funds from the directors of the company, more so when there are allegations that the business of the company was being carried on for fraudulent purposes. The fraudulent trading prohibition as presently contained in s. 540 of the Companies Act 2016 has been designed to combat such corporate misconduct as it enables the entire course of the director's conduct to be examined. If proven, the corporate veil of the company may be lifted as a crucial statutory exception to the common law doctrine of separate legal entity and the limited liability principle, thus making those in default personally responsible without any limitation of liability, for all or any of the debts or other liabilities of the company, as well as potentially subjecting them to criminal prosecution.

[3] This appeal raises a number of issues, which primarily revolve around the interpretation of s. 540 of the Companies Act 2016, including on those described by the defendants as jurisdictional, as well as concerning the overarching position of the defendants that fraudulent trading must in all cases relate to the subject company incurring debt (despite knowing there would be no repayment).

[4] Having heard the appeal – which was conducted *via* Zoom video technology, examined the appeal records and considered the submissions by parties, we unanimously decided to affirm the judgment of the High Court and dismiss the appeal.

[5] These grounds of judgment contain the full reasons for our decision.

[6] The parties are referred to herein as they were at the High Court.

Key Background Facts

[7] The case of the plaintiff – Eastmont Sdn Bhd is not a complex one. Its pleaded case against the six individual defendants is two-pronged. The first is the claim grounded on s. 540 of the Companies Act 2016 ("the CA 2016"). The second is an action under the tort of conspiracy to injure.

[8] By way of a letter of award dated 3 August 2012 ("the LOA"), the plaintiff company was appointed by Mega Planner Jaya Sdn Bhd ("Mega Planner") to carry out substructure works for a project involving, among others, the development of two blocks of condominium in Taman Melawati Kuala Lumpur, for the contract price of RM26 million. The plaintiff's position is that whilst it had undertaken the works as specified, the LOA was subsequently in December 2013 mutually terminated by the parties. The plaintiff asserted that Mega Planner owed the plaintiff the amount of RM12,331,667.29 for the works done by the plaintiff pursuant to the LOA.

[9] A number of years later, but just before the statute of limitation set in, the plaintiff instituted a suit *vide* KL High Court Suit No. WA-22C-51-06-2019 ("Suit 51") for the recovery of the said sum. Crucially, however, upon service of the writ on Mega Planner, the plaintiff discovered that Mega Planner had in fact just been wound up by Shah Alam High Court on 14 May 2019, at the instance of a petition filed by Dakota Engineering Sdn Bhd ("Dakota Engineering"). This petition was preceded by a suit commenced by Dakota Engineering against Mega Planner on 3 October 2018 for which a judgment in default (JID) was entered against Mega Planner on 27 November 2018. This JID was the basis of the winding up petition filed by Dakota Engineering, which led to the winding up of Mega Planner.

[10] In view of the winding up status of Mega Planner, the plaintiff had then sought and did on 30 October 2019, obtain leave of the winding up court to commence an action against Mega Planner, proceeded with its Suit 51 and on 12 December 2019, successfully also obtained a JID against Mega Planner for the sum of RM10,050,819.57 as arrears due under the final statement of account dated 28 October 2014.

[11] Significantly, after securing the JID, the plaintiff discovered that Dakota Engineering and Mega Planner were related concerns and had common directors and/or shareholders (and/or ultimate controllers). Additionally, the six defendants were at the material time the directors and/or shareholders of either Mega Planner or Dakota Engineering (or their respective corporate shareholders) or common to these entities. The plaintiff pleaded that the defendants were the ultimate controllers of both companies at the material time.

[12] This led to the plaintiff filing a suit in June 2020 contending that the defendants had jointly and/or severally carried on the business of Mega Planner with the intention of defrauding the plaintiff by winding up Mega Planner through Dakota Engineering in order to avoid the payment of debts to the plaintiff, therefore contravening s. 540 of the CA 2016. It was also pleaded that the defendants had jointly and/or severally conspired to injure the plaintiff by orchestrating the winding up of Mega Planner.

[13] On 3 September 2021, after a full trial, the High Court allowed the plaintiff's claims and gave judgment against all the defendants.

Principles Of Appellate Intervention

[14] The law is well-established in that an appellate court will not interfere unless the trial court is shown to be plainly wrong. The Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441, in the judgment written by Azahar Mohamed FCJ (later CJM) reaffirmed the principle to be followed by an appellate court when reversing findings of fact by a trial court:

[60] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (at p 10) per Steve Shim CJ (Sabah & Sarawak). More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd v. Genisys Intergrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 where it was held at p 800:

> It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[15] The Court of Appeal in *Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd* [2017] 5 CLJ 58 in the judgment of the court delivered by Harmindar Singh JCA (now FCJ) held thus:

> [20] Nevertheless there are occasions when appellate interference is warranted and these occasions have been well set out in numerous cases. Some of these occasions are:
>
> (a) where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations (see *Director of Forestry, Sabah & Anor v. Mau Kam Tong & Ors And Another Appeal* [2010] 3 CLJ 377; [2010] 3 MLJ 509);
>
> (b) where there was no proper evaluation of the evidence by the trial judge (see *Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626; [2009] 6 MLJ 1);
>
> (c) where the decision arrived at by the trial court was without judicial appreciation of the evidence (see *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1);
>
> (d) where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion (see *Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd* [2008] 2 CLJ 284; [2008] 2 MLJ 87);
>
> (e) where the trial judge was plainly wrong in arriving at his decision (see *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97);
>
> (f) where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given

A before him (see *First Count Sdn Bhd v. Wang Yew Logging & Plantation Sdn Bhd* [2013] 1 LNS 625; [2013] 4 MLJ 693 which followed the Privy Council case of *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 1 LNS 40; [1984] 2 MLJ 165); and

(g) where the judgment is based upon a wrong premise of fact or
B of law (see *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 1 LNS 1416; [2012] 4 MLJ 149).

[16] In a more recent Federal Court's pronouncement on the principles surrounding appellate intervention in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020]
C 10 CLJ 1, which cited the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, it was reaffirmed that the position has always been that a decision which is arrived at due to a lack of judicial appreciation of evidence is plainly wrong.

[17] For emphasis, on situations where the decision arrived at by the trial
D court was without judicial appreciation of the evidence, in the leading case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19, Gopal Sri Ram JCA (later FCJ) elucidated on the principles of appellate intervention (subsequently cited and upheld by the Federal Court) in the following terms:

Principles of Appellate Intervention

E

… A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must
F take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that
G witness' evidence runs the risk of having his findings corrected on appeal.

The Essence Of The Verdict Of The High Court

[18] At this juncture, it may be useful to state the key findings of the High Court, which after having examined the evidence adduced at trial including
H a total of seven witnesses (one for the plaintiff, and the six defendants themselves for the defendants), allowed the plaintiff's claims with costs of RM50,000.

[19] The High Court held that there is an intent to defraud by the defendants on the part of Mega Planner and Dakota Engineering based on,
I among others, the admission by the third defendant that the defendants were aware of the debts due from Mega Planner to the plaintiff since 2014; the admission by the second defendant that Mega Planner was wound-up to

avoid paying any debts to the creditors; that Dakota Engineering and Mega Planner are related companies as admitted by the first and third defendants in their respective witness statements; as well as the testimony of the first and third defendants, who despite not holding the position as directors of Mega Planner decided not to defend the Dakota Engineering's claim against Mega Planner as they had found there were no merits in defending the same and thus letting the JID be entered against Mega Planner.

[20] The High Court further found that in the absence of any documentary evidence to support the validity of the claim by Dakota Engineering against Mega Planner, an adverse inference could justifiably be drawn against the defendants. In any event, the purported debts owed by Mega Planner were not reflected in Dakota Engineering's financial statements as also admitted by the first defendant, and neither did Mega Planner record any financial problem at the time when it was wound up.

[21] The High Court concluded that the defendants had used Dakota Engineering and attempted to intervene in the plaintiff's leave application to sue the wound-up Mega Planner, and that the sixth defendant had even affirmed the affidavit in support to intervene pursuant to the instruction given by the first defendant. It was determined that the first and third defendants are the controlling minds of Mega Planner and Dakota Engineering.

The Defendants' Principal Arguments

[22] The defendants argued that case law authorities held that in actions against directors for fraudulent trading, the elements that must be proved are first that the business of the company has been carried out with intent to defraud creditors, or for any fraudulent purpose; and secondly, the defendants were knowingly parties to the company's carrying on of the business in that manner with intent to defraud creditors or for any such fraudulent purpose.

[23] Thus, as correctly submitted by the defendants, in order to succeed under s. 540, the plaintiff must establish firstly, the business of Mega Planner has been carried out with intent to defraud the plaintiff or any creditor or for any fraudulent purpose; that the defendants participated in the carrying on of such business; and that the defendants did so knowingly.

[24] The defendants in this appeal argued however, that the plaintiff failed to satisfy the elements of s. 540 of the CA 2016. This is principally because the case of the plaintiff, as pleaded, is that the defendants had carried on the business of Mega Planner with the intention to defraud the plaintiff by winding up Mega Planner through Dakota Engineering so as to avoid paying the debts to the plaintiff. The defendants argued that there was, in that situation, no evidence of any intent to defraud by Mega Planner incurring any debt.

[25] The defendants further argued that as s. 540 seeks to make the controllers of Mega Planner liable for the debts of Mega Planner, the plaintiff must establish that the defendants were in charge of Mega Planner and that there is dishonesty on the part of the defendants in their incurring of company debts when either they knew that the debts would not be repaid or there was a substantial and unreasonable risk that they would not be.

[26] However, according to the defendants, no evidence was led by the plaintiff that at the time the plaintiff was appointed by Mega Planner (on 3 August 2012), all the defendants were in charge of the business of Mega Planner. And more importantly, neither was there any evidence that the defendants were dishonest in incurring the purported debt of Mega Planner to the plaintiff back in 2012.

[27] The defendants also maintained that the claim for the tort of conspiracy to injure the plaintiff was not made out, and that the awards of damages by the High Court was not justified.

The Stance Of The Plaintiff

[28] The plaintiff took the contrary position. It argued that there is sufficient evidence to prove that the business of Mega Planner was carried on to defraud its creditors. The first and third defendants were aware of the debts due by Mega Planner to the plaintiff since 2014 and that the defendants had planned and framed the winding up proceeding against Mega Planner by employing Dakota Engineering where both these companies were related and the winding-up was grounded on the JID entered by Dakota Engineering against Mega Planner.

[29] After all there was, according to the plaintiff, no proof that Mega Planner was in fact owing the sum of RM5,890,724.10 to Dakota Engineering to justify the JID and that, in any event, Mega Planner did have the financial means to pay the debts said to be due to Dakota Engineering.

[30] The plaintiff maintained that Mega Planner had been wound up with the intention to defraud the plaintiff so as to avoid payments to the plaintiff since at all material time, it was proven that the defendants were aware of the outstanding payment due by Mega Planner to the plaintiff. The plaintiff emphasised that the first and third defendants were the controlling mind of both Mega Planner and Dakota Engineering and that the defendants had all conspired with each other to injure the plaintiff, such that the latter was thus fully entitled to the judgment sum as awarded by the High Court.

[31] The plaintiff asserted that the High Court was also correct in its findings against the defendants on its claim of conspiracy to injure the plaintiff and in its award of damages against the defendants.

The Analysis & Findings Of This Court

The Challenge On The Jurisdiction Of The High Court To Try The Suit By The Plaintiff

First Issue – Whether The Fraudulent Trading Suit Must Be Brought In The Same Winding Up Court Or In The Same Court In Which Mega Planner Was Sued By The Plaintiff

[32] A preliminary but important point of contention raised by the defendants is that a plain reading of s. 540 of the CA 2016 shows that only the court before which either the winding up of a company is pending or there are any proceedings against a company that is seized of the jurisdiction to invoke the said statutory provision.

[33] Section 540 of the current Companies Act 2016 which is in *pari materia* with s. 304 of the repealed Companies Act 1965 ("the CA 1965") reads as follows:

> **Section 540. Responsibility for fraudulent trading**
>
> (1) *If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if the court thinks proper so to do, declare that any person who was knowingly a party to the carrying on of the business* in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court directs.
>
> (2) Where a person has been convicted of an offence under subsection 539(3) in relation to the contracting of such a debt as is referred to in that section, the court on the application of the liquidator or any creditor or contributory of the company may, if the court thinks proper so to do, declare that the person shall be personally responsible without any limitation of liability for the payment of the whole or any part of that debt.
>
> (3) When the court makes any declaration under subsection (1) or (2), the court may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision for making the liability of any person under the declaration a charge on any debt or obligation due from the company to the person, or on any charge or any interest in any charge on any assets of the company held by or vested in the person or any corporation or person on his behalf, or any person claiming as assignee from or through the person liable or any corporation or person acting on his behalf, and may from time to time make such further order as is necessary for the purpose of enforcing any charge imposed under this subsection.

A (4) For the purposes of subsection (3), "assignee" includes any person to whom or in whose favour by the directions of the person liable the debt, obligation or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration and consideration by way of marriage, given in good faith and without notice of any of the matters on the ground of which the declaration is made.

B (5) Where any business of a company is carried on with the intent or for the purpose mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business with that intent or purpose, commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding ten years or to a fine not C exceeding one million ringgit or to both.

(6) This section shall have effect notwithstanding that the person concerned is criminally liable under this Act in respect of the matters on the ground of which the declaration is made.

(7) On the hearing of an application under subsection (1) or (2), the D liquidator may give evidence or call witnesses himself.

(emphasis added)

[34] The argument of the defendants is that whilst the section starts in sub-s. (1) by stating that "If in the course of the winding up of a company or in any proceedings against a company", it later in the same provision goes E on to say that "the court on the application of the liquidator or any creditor or contributory of the company", may pursue the matters stated therein. Emphasis here is on the word "court" where reference is made to "the court", but not "a court".

F **[35]** Grammatically, the word "the" is a definite article which is used to refer to specific or particular nouns. This therefore means that the reference to "the court" is not to any court, but to the court referred to earlier in the section, which is the winding up court or the court before which there is any proceedings against the company.

G **[36]** As such, the defendants posited that only "two" courts have the jurisdiction to invoke s. 540, namely the winding up court or the court in which there is any proceedings against the company such as, in this case, Mega Planner. Therefore, other courts, including the one which heard this matter at first instance does not have the jurisdiction to hear a complaint or a charge under s. 540 of the CA 2016.

H **[37]** Thus, in this case, in order to invoke s. 540, the plaintiff should have instead moved the winding up court which wound up Mega Planner, or the court which heard the suit by the plaintiff against Mega Planner (which was in Suit 51). But the plaintiff did not.

I **[38]** The defendants submitted that it was therefore wrong for the plaintiff to have commenced a new action altogether (which is, the instant case) against the defendants and moved the court below to invoke the provisions of s. 540 of the CA 2016 since the High Court, which heard the matter at

first instance did not have the jurisdiction to entertain a suit under s. 540 as it was neither the winding up court nor the court before which there was any proceeding against Mega Planner. The instant suit now appealed before us is only against the defendants and does not include Mega Planner as a defendant.

[39] The plaintiff on the other hand disagreed with the position taken by the defendants. In essence, the plaintiff argued that the High Court in this case has the jurisdiction to hear the matter in relation to s. 540 of the CA 2016 pursuant to s. 25 of the Courts of Judicature Act 1964 on the powers of the High Court, and given that s. 540 does not state that only a specific court or the insolvency court, as contended by the defendants, has the jurisdiction to hear and decide a matter envisaged in the section. Furthermore, the word "court" is defined under s. 2 of the CA 2016 as "the High Court or a judge of the High Court".

[40] Now, to start with, we agree with the defendants that the question of whether the High Court in this case could hear a suit seeking to invoke s. 540 of the CA 2016 is one of jurisdiction and can therefore be raised at the appellate stage. It could even be taken up for the first time on appeal since it is a point of law which raises a question of jurisdiction (see the former Federal Court decision in *Yong Mok Hin v. United Malay States Sugar Industries Ltd* [1967] CLJU 220; [1967] 1 LNS 220; [1967] 2 MLJ 9). This is exactly the position before us, as the matter was not raised in the earlier proceedings at the High Court.

[41] For the avoidance of doubt, we do not think that allowing this issue to be ventilated for the first time before us would be unfair or prejudicial to the plaintiff since this is a legal and jurisdictional point that does not involve the complaint that the plaintiff would have no chance of contradicting by way of witness testimony, which was how evidence was adduced at the High Court (see also this court's decision in *Pentadbir Tanah Daerah Timur Laut, Pulau Pinang v. Yeoh Oon Theam* [2017] 3 CLJ 557; [2017] 1 MLRA 298).

[42] At first blush, we would not disagree that the literal construction of s. 540 ascribed to the defendants, which questioned the jurisdiction of the High Court in this case to hear the suit, as above, appears attractive. Nevertheless, in our view, we are not persuaded that it is of any merit. We are not convinced that a statutory provision which attaches personal liability on the directing minds of a company engaged in fraudulent trading by the lifting of the corporate veil ought to be interpreted in a manner that restricts jurisdiction with procedural niceties of merely ancillary importance.

[43] More significantly, this court already had the occasion to deal with this same argument as now raised by the defendants, in the case of *Chin Chee Keong v. Toling Corporation (M) Sdn Bhd* [2016] 6 CLJ 666; [2016] 4 MLRA 180, and had rejected the same. Although that case (and a number of others)

was in relation to the interpretation of the application of the now repealed s. 304 of the CA 1965, s. 540 as now enacted in the CA 2016 is the equipollent and successor provision (exact *verbatim*) of s. 304 which should therefore be followed and applied as appropriate.

[44] One of the key issues raised in *Chin Chee Keong* (*supra*) was whether the action against the defendants must be maintained in the same action taken against the company. There, like here, it was also similarly submitted that s. 304(1) of the CA 1965 did not envisage the plaintiff maintaining two separate actions since its wording required the evidence of fraudulent trading to be uncovered in the course of winding up proceedings or in any proceedings against the company such that the action should also be taken against the defendants in those same proceedings.

[45] The same argument on the use of the words "the court" as opposed to "a court" had been raised, as was the contention that the words "on the application of the liquidator or creditor or contributory of the company" were employed in the said section as opposed to words such as "suit" or "fresh proceedings".

[46] In essence, it was asserted that the action against both the company and the defendants must be taken in the same single action, either in the action to wind up the company, or any other proceedings against the company. Related to this is the argument, also now repeated before us that under sub-s. 304(1), it must be in the course of either of these proceedings that the relevant evidence emerges of the fraudulent trading.

[47] In delivering the judgment of the court, Mary Lim JCA (later FCJ) clarified why this contention could not succeed, in terms we fully subscribe to, as follows:

> [36] We agree with the further submissions of the learned counsel for the plaintiff that the action against the defendants are, in any case, best taken in separate proceedings instead of in the same proceedings against the company. On a practical note, subsection 304(1) ought not to be read literally as the court must first make a finding against the company before it can make the declaratory order and other consequential orders against the defendants. The Supreme Court in *Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd* [1992] 1 MLRA 336 was of the view that actions under subsection 304(1) of the Companies Act 1965 should not be determined by way of affidavit evidence but by writ action. Every opportunity ought to be afforded to defendants to lead evidence to defend themselves. That is best served in trial proceedings after the plaintiff has established itself as a creditor of the company, which is precisely the case here.

[48] The decision in that case, which also looked at the comparable provisions in Singapore, the United Kingdom and Australia concluded, on this point, thus:

> [43] Having examined our provision very carefully, and bearing in mind the third requirement that must be met before a right of action under subsection 304(1) may be invoked, we therefore agree with the learned High Court Judge in this regard, that the defendants do not need to be sued in the same suit taken against the company. Indeed, separate proceedings ought to be taken. Since the plaintiff is relying on the second limb of subsection 304(1), the plaintiff necessarily has to sue the company first, secure judgment in its favour which renders it the status of "creditor" before the plaintiff can initiate an action under subsection 304(1).
>
> [44] Therefore, an action against the defendants under subsection 304(1) need not be maintained in the same set of proceedings brought against the company.

[49] Accordingly, we affirm that in order for the court to invoke s. 540 of the CA 2016, it is unnecessary for the present suit to have been instituted in either the winding up court or in any proceedings against the company such as in the court which heard the matter against Mega Planner in Suit 51, and for which the JID had been obtained by the plaintiff against the company. The plaintiff is perfectly entitled to file a separate action against the directors or other persons, as the High Court in this instant case is vested with the jurisdictional authority under s. 540 to hear and decide on the instant suit.

[50] For further emphasis, we state that this position is also in congruence with the very objective of s. 540 of the CA 2016, as can be immediately seen from the following judicial pronouncements in no fewer than five different cases, none of which lists the requirement, as is now posited by the defendants, that the fraudulent trading action must be commenced in the winding up court or in the same action taken against the company. First, in *Chin Chee Keong* (*supra*), it was held as follows:

> [16] The primary object behind subsection 304(1) of the Companies Act 1965 is to statutorily provide for the lifting of the veil of incorporation in the specific circumstances of fraudulent trading with a view to ultimately pinning personal accountability and liability on the directing minds behind such trading of the company. Subsection 304(1) affords the creditor of the company a civil remedy personally against such persons.

[51] Secondly, in *Lama Tile (Timur) Sdn Bhd v. Lim Meng Kwang & Anor* [2015] 3 CLJ 763, this court said:

> [23] Section 304 is a specific statutory provision which allows the corporate veil to be lifted in the limited situations specified. Earlier in this judgment we have underlined that it is applicable in a situation where in the course of proceedings against a company, it appears that the business of the company has been carried on with intent to defraud creditors, a creditor can make an application to court to request that the court declare that any person who was knowingly a party to such carrying on of the business of the company, to be personally responsible. The evidence in this appeal shows precisely that. The directors and shareholders of LMK Edaran

purposely and knowingly engaged in a course of conduct to mislead the appellant (by adding the 'S' to the signboard), and but by the same token transferred the business of LMK Edaran to SLMK Edaran (previously Southern Taipan Sdn Bhd) to render LMK Edaran a dormant company.

[52] The third case is another decision of this court in *Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal* [2016] 2 CLJ 563, where Mohd Zawawi Salleh JCA (later FCJ) stated thus:

> [37] Section 304 of the Companies Act 1965 is aimed principally at curbing the possibility on the part of the officers of a company to act opportunistically and take advantage of the principle of the separate legal personality of a company and the principle of limited liability. As an exception to these principles, there are circumstances when the law duly acknowledges, and for which it accordingly provides the possibility, in very specific situations, for the corporate veil to be pierced. Once the corporate veil has been pierced the creditors of the company whose veil has been pierced may satisfy their claims from the personal assets of the company's shareholders.

[53] Further, in the case of *Tetuan Sulaiman & Taye v. Wong Poh Kun & Anor And Another Appeal* [2023] 4 CLJ 699; [2023] 3 MLJ 360, this court observed:

> [25] We are in agreement with the High Court in *Huatah Sdn Bhd v. Yap Chee Kian & Ors* [2020] 8 MLJ 98; [2020] 2 CLJ 560 that in actions against directors for fraudulent trading, the elements that must be proved are:
>
> (a) the business of the company has been carried out with intent to defraud creditors, or for any fraudulent purpose; and
>
> (b) the defendants were knowingly parties to the company's carrying on of the business in that manner with intent to defraud creditors or for any fraudulent purpose.
>
> [26] As to whether there was intent to defraud or to carry out any fraudulent purpose is a question of fact to be inferred from the surrounding circumstances and the subsequent conduct of the defendants, especially the concealment of material facts (see *LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors* [2010] 1 MLJ 185; [2010] 4 CLJ 849).

[54] And the fifth is a recent decision of the Federal Court in *Lai Fee & Anor v. Wong Yu Vee & Ors* [2023] 4 CLJ 1; [2023] 3 MLRA 495, where Vernon Ong Lam Kiat FCJ expressed the following principles in clear terms:

> **Doctrine of Corporate Personality**
>
> [22] An action under s. 540 of the CA 2016 underpins the existence of the statutory exception to the common law doctrine of corporate personality, also known as the separate legal entity principle: that the company is treated as an entity separate from its members. This doctrine was propounded in the landmark judgment of the House of Lords in *Aron*

Salomon v. A Salomon & Co Ltd [1879] AC 22. In *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [*1996] 2 MLRA 147 FC the Federal Court reaffirmed the basic principle of the fundamental attribute of corporate personality that the corporation is a legal entity distinct from its members.

[23] The application of the statutory exception to the corporate personality principle has been also described as the lifting of the corporate veil – the effect of which is to render the members or officers of the company personally liable for the debts and liabilities of the company under certain circumstances. Under s. 304 of the former Companies Act 1965, responsibility and liability will be attached to any person if it can be established that that person(s) has conducted a company's business with intent to defraud creditors. Section 540 of the current CA 2016 which is in *pari materia* with s 304 of the Companies Act 1965 reads as follows: …

[55] The distillation of the key principles on the application of s. 540 of the CA 2016 from case law authorities, which principally are also relevant to the instant case before us is well set out in *Lai Fee & Anor v. Wong Yu Vee & Ors* (*supra*) as found in the following passages, which we reproduce hereunder:

[24] That responsibility for fraudulent trading under s. 540 of the CA 2016 is the statutory exception to the corporate personality doctrine has been the subject of extensive discussion in a line of cases. Accordingly, it might be useful and desirable to set out a synopsis of the well-established principles which govern the application of this statutory exception which are:

i. The words 'with intent to defraud creditors... or for any fraudulent purpose' in s. 304 of the Companies Act 1965 should be read disjunctively even though on the facts of the case both limbs are relevant and applicable (*Siow Yoon Keong v. H Rosen Engineering BV* [2003] 2 MLRA 126 CA);

ii. In the context of carrying on business, the phrase 'with intent to defraud creditors' is in general a proper inference that the company is carrying on business with intent to defraud the creditors of the company if the company continues to carry on business to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts. (*R v. Grantham* [1984] BCLC 270). It has also been interpreted to include an intent to deprive creditors, of an economic advantage or inflict upon them some economic loss (*Coleman v. The Queen* [1987] 5 ACLC 766). The word 'intent' is being used in the sense that a man must be taken to intend the natural or foreseen consequences of his act (*Re Cooper*, (*supra*) at 267);

iii. The word 'fraud' is also defined under s. 17 of the Contracts Act 1950. According to Sinnadurai, *Law of Contract*, Fourth Edition 2011 at para [5.07], fraud is defined 'to include certain acts which are committed with intent to induce another party to enter into a

contract'. Section 17 sets out five types of different acts which constitute fraud. These include 'a promise made without any intention of performing it' and 'any other act fitted to deceive': s. 17(c) and (d), Contracts Act 1950.

iv. The words 'if ... it appears' in s. 304 of the Companies Act 1965 is indicative of a lower threshold in order to trigger the operation of s. 304. It does not matter whether s. 304 contains in it both civil and a criminal provision – the civil provision in sub-section (1) and the criminal sanction in sub-section (5) are properly carved out and they do not interfere in each other's operation (*Siow Yoon Keong v. H Rosen Engineering BV* [2003] 2 MLRA 126; *JCT Ltd v. Muniandy Nadasan & Ors And Another Appeal* [2016] 2 MLRA 562);

v. The burden of proof is on the plaintiffs to establish fraudulent trading within the meaning of s. 304 of the Companies Act 1965. The standard of proof in civil cases involving proof of fraud or fraudulent conduct is on the balance of probabilities (*Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 5 MLRA 191 FC);

vi. The existence of fraud is a question of fact. It is dependent on the circumstances of each particular case. Fraud must mean actual fraud, *ie*, dishonesty of some sort (*PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 MLRA 562 FC);

vii. In order to establish dishonesty under s. 304 of the Companies Act 1965, it must be shown that firstly, what was done was dishonest according to the ordinary standard of reasonable and honest people, and secondly that the actor himself must have realised that the act was by those standards dishonest (*Tradewinds*, (*supra*));

viii. It is fraud if it is proved that there was the taking of a risk which there was no right to take which would cause detriment or prejudice to another. It need not be proved that the defendant knew at the time when debts were incurred that there was no reasonable prospect of creditors ever receiving payment of their debts. It was enough if the defendant realised at the time when the debts were incurred that there was no reason for thinking that funds would be available to pay the debt when it would become due or shortly thereafter. These words import a criterion that is partly subjective and partly objective (*Regina v. Sinclair* [1968] 1 WLR 1246);

ix. Whether there was any intention on the part of the defendants to defraud or to carry on any fraudulent purpose is a question of fact to be inferred from the surrounding circumstances and the subsequent conduct of the defendants, especially the concealment of material facts (*Rahj Kamal bin Abdullah v. PP* [1998] 1 SLR 447; *LMW Electronics Pte*, (*supra*));

x. Actual knowledge was required before a person could be said to be knowingly a party to the fraudulent transaction carried out by a company within the meaning of s. 304 of the Companies Act 1965 – it must be shown that the person has participated, concurred or

taken some positive steps in the carrying on of the company's business in a fraudulent manner – however, it is not necessary to show proof of his having assumed a controlling or managerial role over the company's business before he could be said to be a party to the carrying on of it (*Tan Hung Yeoh v. Public Prosecutor* [1999] 2 SLR(R) 262 HC);

xi. It is not necessary to establish a scheme to defraud to trigger the invocation of s. 304 of the Companies Act 1965. The wordings of s. 304 do not lend itself to be read in such a manner – a single act of doing business to defraud a creditor would be sufficient to trigger an action for compensation against the errant person in his personal capacity. A business may be found to have been carried out with intent to defraud creditors notwithstanding that only one creditor is shown to have been defrauded, and by a single transaction (*Re Gerald Cooper* (*supra*); *Morphitis v. Bernasconi & Ors* [2003] BCLC 53; *Prem Krishna Sahgal*, (*supra*)).

[56] The overriding objective of the provision, we reiterate, is therefore to allow the corporate veil to be pierced, representing a crucial departure from the well-entrenched principles of limited liability and separate corporate legal personality. This, in turn, means that once fraudulent trading is established, there would then be personal responsibility on the part of any person who was knowingly a party to the carrying on of such business with intent to defraud, without any limitation of liability, for all or any of the debts or other liabilities of the company, as the court may direct.

[57] We therefore conclude this issue by stating that whilst s. 540 can be engaged only "in the course of the winding up of a company or in any proceedings against a company", as this court has made abundantly clear in *Chin Chee Keong* (*supra*), this does not translate into a proposition that the fraudulent trading action against the alleged defaulters, like presently, must be pursued in the winding up court itself or in the same action taken against the company.

Second Issue – Whether The Fraudulent Trading Must Be Discovered In The Winding Up Process Or In The Proceeding Against The Company

[58] In addition, in pursuit of what the defendants described as another jurisdictional issue, they also argued that since, as contended by the plaintiff, the fact that Mega Planner and Dakota Engineering shared the same ultimate controllers (as pleaded by the plaintiff), was only discovered subsequent to the plaintiff obtaining the JID against Mega Planner, the second limb of s. 540 does not come into play. This is because the plaintiff did not discover about the purported controllers and their alleged intention to defraud "in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud the creditors of the company …".

[59] We however need only refer further, on this issue, to the following passages in the judgment of this court in *Chin Chee Keong* (*supra*), which said this:

> [20] We agree with the learned High Court Judge but add that there is in fact a further requirement in subsection 304(1) which must also be satisfied; and it pertains to the discovery of the fraudulent trading.
>
> [21] There are two instances under subsection 304(1) when evidence of fraudulent trading may emerge. The first is when the company is being wound up; the second is in proceedings taken against the company.
>
> [22] In the first situation, it is in the course of winding up the company when the liquidator, creditor or contributory of the company finds evidence of fraudulent trading. In such a case, either of them may apply to the court for an order under subsection 304(1), the effect of which is to declare any person who was knowingly a party to such fraudulent trading to be personally liable for the debt or liability of the company.
>
> [23] In the second scenario, proceedings have already been initiated against the company. And, it is in those proceedings that the fraudulent trading is discovered. It stands to reason that those proceedings against the company must have culminated in judgment being rendered in favour of the claimant. Until and unless that happens, the claimant is not a creditor in relation to the company. When that happens, the creditor may similarly apply to the court for the relevant order under subsection 304(1).

[60] It is clear to us that the words "in the course of the winding up of a company" so plainly refer to the winding up process, encompassing the liquidation of the company which is so much wider than and does not mean only the proceeding in the winding up court itself (such as the proceeding which resulted in the granting of the winding up order). And neither does *Chin Chee Keong* (*supra*) say that evidence of fraudulent trading must be discovered in the proceedings of the winding up court.

[61] Here, the plaintiff, as a creditor of Mega Planner, discovered the fraudulent trading in the process of the winding up of Mega Planner in the sense that it was after it had sued and obtained the JID against Mega Planner subsequent to the winding up of the company on the petition of Dakota Engineering. This was also after Dakota Engineering's unsuccessful attempt to intervene in the application by the plaintiff for leave to sue Mega Planner (which by then already a wound-up company) which eventually led to the JID for the plaintiff against Mega Planner. All these may rightly be said to have occurred in the process of the winding up (or the liquidation) of Mega Planner.

[62] This is notwithstanding that the fraudulent trading could be the course of conduct concerning the winding up of the company itself. For it is still a matter discovered in the course of the winding up of the company.

[63] This therefore renders the argument of the defendants that the plaintiff did not fulfil the second limb of s. 540 (in respect of "in any proceedings against a company") inconsequential since the plaintiff has already plainly satisfied the first limb ("in the course of the winding up of a company"). In any event, we also are of the view that there is no compelling reason to construe that the words in the second limb – "in any proceedings against a company" as requiring that the fraudulent trading must only be discovered in that proceeding against the company. This is because the claimant can, subsequent to that suit (against the company), like presently, initiate an action for fraudulent trading against the persons who are knowingly party to the carrying on business with intent to defraud (such as in this instant case, against the defendants).

[64] Thus, in this case, it could also be said that it was in that suit by the plaintiff (Suit 51) against Mega Planner (by then, already wound up) where Dakota Engineering tried in vain to intervene in the preceding proceeding for leave by the plaintiff that provided the genesis for the discovery of evidence leading to the allegation of fraudulent trading against the defendants, given the relationships amongst them, as well as *vis-à-vis* Mega Planner and Dakota Engineering.

[65] It is in our view still within the scope of s. 540 if the discovery is made in the process of the winding up (after the granting of the winding up order) or subsequent to the proceeding against the company, provided there was in the first place such a proceeding against the company which had subsequently led to the discovery.

[66] To put it another way, the key prerequisites or the *sine qua non* to the application of s. 540 of the CA 2016 *vis-à-vis* the words "(1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud …" is that it must be shown that the company in question has either been wound up (which is the case here) or that a proceeding has been taken against it (also the case presently).

[67] We conclude therefore that the defendants' contention on these two issues, which they characterised as a jurisdictional challenge to the High Court invoking s. 540 of the CA 2016 – to be devoid of merit.

The Main Substantive Grounds Of Appeal On Section 540

[68] We set out again the provision of s. 540(1) of the CA 2016.

> **Section 540 Responsibility for fraudulent trading**
>
> (1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the

A application of the liquidator or any creditor or contributory of the company, may, if the court thinks proper so to do, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court directs.

B

[69] The key principles on the application of s. 540 of the CA 2016 as set out by the Federal Court in *Lai Fee & Anor v. Wong Yu Vee & Ors* (*supra*) and reproduced above are the proper context in which the other substantive grounds of appeal raised by the defendants ought to be considered.

C **[70]** In light of the provisions of s. 540 of the CA 2016, as set out above, and based on case law authorities, what must be established by the plaintiff to succeed in an action under s. 540 are three key elements.

[71] For present purposes, the three are first, that the business of Mega Planner had been carried on with intend to defraud the creditors of the
D company. Secondly, the defendants participated in the carrying on of the business in that manner, and thirdly, the defendants participated knowingly, that is with knowledge that the business was being carried on with such intent to defraud.

[72] We shall examine the arguments raised by the defendants in this
E appeal in the context of these three elements of s. 540(1), and at the same time, we shall analyse whether the plaintiff has established all these elements to prove its case under the provision.

First Element – Whether The Business Of Mega Planner Was Carried On
F With Intent To Defraud

[73] This is the first element that the plaintiff must establish. Relevant to this, the defendants raised a number of issues in support of their contention that this element has not been made out.

Whether The Winding Up A Company Could Amount To The Carrying On
G Business Of The Company With Intent To Defraud

[74] The defendants contended that despite the language of s. 540 which requires that the business of the company to have been carried on with the intent to defraud creditors, the plaintiff has wrongly equated the act of
H winding up Mega Planner as carrying on the business of Mega Planner to defraud the plaintiff. The defendants maintained that the winding up the company does not amount to carrying on business.

[75] The case of *Carman v. The Cronos Group SA & Others* [2006] BCC 451 was mentioned in support, which the defendants argued stands for the
I proposition that winding up is different from carrying on business since for the purposes of s. 213 of the English Insolvency Act 1986, upon the

presentation of a winding up petition, the subject company cannot be considered to be carrying on its business. As highlighted by the defendants, the High Court in that case held:

> [36] There was an issue between the parties whether a company was capable of fraudulent trading during the period between the presentation of the petition to wind up and any consequent winding up order. Section 129(2) of the 1986 Act provides that, with an immaterial exception, the winding up of a company is deemed to commence upon the presentation of the petition for winding up. Section 127 of that Act provides that any disposition of a company's property made after the commencement of its winding up is void unless the court otherwise orders. There have been no orders under s. 127 in this case.
>
> [37] A company cannot be treated as carrying on business when any transaction in the course of that business which amounts to a disposition of the company's property is deemed to be void. It follows, it seems to me, that, on any view, T1 cannot be treated as carrying on business for the purpose of s. 213 after the 26 March 1998 when a winding up petition was presented against it on which a winding-up order was subsequently made. It follows from that that even if I am wrong in my conclusion as to whether the part played by Cronos NV in any of the Third Party payments or the Withdrawals is capable of constituting assistance in fraudulent trading, the three Withdrawals which were made after that date are incapable of constituting such assistance.

[76] We however fail to appreciate how this case can be said to assist the defendants. This English case merely affirms the well-settled principle which similarly obtains in Malaysia that during the period between the presentation of a winding up petition and the making of a winding up order, any disposition of the assets of a company is void unless validated by a court order. It therefore follows that the company cannot be construed as carrying on business during that period, given that any transaction in the course of that business which amounts to a disposition of the assets of the company is void in the first place.

[77] But here, in the case before us, there is no transaction that constituted any disposition of the assets of Mega Planner. This, to us, is clear from the following paragraph of that same judgment, which was not highlighted to us in the submissions by the defendants:

> [38] A company cannot be treated as carrying on business when any transaction in the course of that business **which amounts to a disposition of the company's property** is deemed to be void. It follows, it seems to me, that, on any view, T1 cannot be treated as carrying on business for the purpose of section 213 after the 26th March 1998 when a winding up petition was presented against it on which a winding up order was subsequently made. It follows from that that even if I am wrong in my

A conclusion as to whether the part played by Cronos NV in any of the Third-Party payments or the Withdrawals is capable of constituting assistance in fraudulent trading, the three Withdrawals which were made after that date are incapable of constituting such assistance.

(emphasis added)

B **[78]** More importantly, this English case does not at all say that the presentation of a winding up petition, or the pursuit of a winding up proceedings cannot be tantamount to the carrying on of the business of the company. *Carman v. The Cronos Group* (*supra*) involves the diversion of various assets of the company (hence the disposition), which is unlike in the instant case, where there is no such allegation.

C

[79] Incidentally, that was the position under s. 219(2) on the commencement of winding up by the court, and s. 223 on the avoidance of dispositions of property upon such commencement, both under the former CA 1965. Presently however, under s. 467(2) of the CA 2016, the D commencement of winding up is generally on the date of the winding up order, although s. 472(1) renders disposition of property to be void after the presentation of the winding up petition, effectively in this regard maintaining the previous position.

[80] The fraudulent trading before us, or to be more precise, the business E of Mega Planner said to have been carried on with intent to defraud the creditors of the company here (namely, the plaintiff) – was the course of conduct of the defendants (which controlled both Mega Planner and Dakota Engineering) orchestrating a judgment in default to be entered against Mega Planner and the subsequent institution of the winding up proceeding against F Mega Planner, *albeit* filed by Dakota Engineering, and not resisted by Mega Planner, with the result that the plaintiff was denied payment of debt owing to it by Mega Planner.

[81] In our judgment, there is no sound basis in law or principle to exclude the scheme to wind up a company by its controllers as falling outside the G scope of s. 540 of the CA 2016. The prevailing approach to statutory interpretation is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a fashion which best gives effect to that purpose.

[82] It is unmistakable from its language that the objective of s. 40 is H twofold – to provide redress to creditors and other victims who suffer loss as a result of fraudulent trading and to make those who have been parties to the fraudulent trading liable to compensate the creditors. This is, in our view, much more consonant with the true purpose of the legislation.

I **[83]** Now, we need to clarify one important issue, if it is not already obvious. This concerns the question as to how exactly could the winding up of Mega Planner be construed as a business of Mega Planner being carried on with an intent to defraud? The winding up of Mega Planner was in the

first place not initiated by Mega Planner. It was petitioned by Dakota Engineering. The answer, in our view, is quite plain in that the defendants were in the position of control over both Mega Planner and Dakota Engineering (as will be seen further later). They were able to cause Dakota Engineering to initiate the suit and then to file the petition and later to apply to intervene in the leave application. At the same time, the defendants caused Mega Planner not to contest the suit which resulted in the JID nor resist the subsequent petition which led to the granting of the winding up order, with the consequence of the avoidance of debt payment to the plaintiff as a creditor of Mega Planner, patently prejudicing the position of the plaintiff. It is such course of conduct which amounted to the carrying of the business of Mega Planner with intent to defraud its creditors.

[84] Accordingly, for as long as the undertaking of the suit which secured the JID against Mega Planner, the presentation of the winding up petition against Mega Planner and other conduct of the defendants *vis-à-vis* the winding up of Mega Planner could be shown to have been done with intent to defraud the plaintiff, and the defendants were knowingly parties to such course of conduct, a case of fraudulent trading under s. 540 has been made out. In other words, such course of conduct, in light of the true purpose of the statutory provision, may justifiably be considered as a form of "the carrying on of the business" of Mega Planner.

[85] This is also because the word "business" in s. 540 of the CA 2016 must be given a broad interpretation. It is by no means limited to the business actually undertaken by the company in the ordinary course of its commercial existence or in the usual nature of its business operations, such as, in this case, on the part of Mega Planner, property development and construction. It is also not wrong to say that a case under s. 540 can be made out even if the company has ceased its business operations at the time of the commission of fraudulent trading.

[86] We are cognisant of the fact that the only business of Mega Planner was property development and that it had completed a property development project in Taman Melawati in 2012. The plaintiff itself was appointed by Mega Planner on or about 3 August 2012 to carry out substructure works in the development of Taman Melawati. And as stated earlier, about 16 months later, on 5 December 2013, the parties mutually terminated the contract.

[87] Whilst carrying on the company's business would involve the operations necessary for the functioning of the company, it would also extend to the collection of assets acquired in the course of business and distribution of the proceeds in reduction of business labilities (see *Re Sarflax Ltd* [1979] 1 All ER 529). Regardless of the status of a company's business operations, the statutory phrase "the business of the company has been carried on with

A intent to defraud the creditors" would thus be readily engaged whenever the persons in question, with intent to defraud any creditor, deal with the assets and liabilities of the company, inclusive of the company's contractual rights over its assets and liabilities.

B **[88]** An example of a business carried on with intent to defraud may be found in the case of *Tradewinds Properties Sdn Bhd v. Zulhkiple A Bakar & Ors* [2019] 2 CLJ 261; [2019] 1 MLRA 238, where this court considered a scenario which involved the incorporation of a new company as a form of fraudulent trading. It was held thus:

C > [27] We have carefully scrutinised the whole evidence and we are satisfied that the learned judge erred in concluding that the plaintiff failed to prove fraudulent trading. In our view, the fact that the incorporation of the 3rd defendant was due to the Suit 93 can be equated to fraudulent trading as defined under subsection 304(2) of CA 1965. The contemporaneous evidence clearly shows that the 3rd defendant was incorporated prior to
D > CJ, making it possible for the 1st defendant to have incorporated a company in contemplation of evading payments about one and half year prior to the CJ.

[89] Thus, in the instant case, the carrying on of the business of Mega Planner with intent to defraud would therefore be the involvement of the
E relevant persons, namely the defendants, *via* Dakota Engineering commencing a suit against Mega Planner, and especially from the more crucial perspective of the subject company, deliberately causing Mega Planner (the subject company) not contesting the same, resulting in the granting of a judgment in default against the company, and soon after, with
F again Mega Planner not resisting the winding up petition against itself, with the end result being the winding up of Mega Planner and thereby the consequential deprivation of the debt payment due to the plaintiff.

Whether The Business Was Carried On With Intent To Defraud If The Plaintiff Did Not Show Mega Planner Incurred Debt At The Material Time

G **[90]** Next, the defendants argued that cases such as the English Court of Appeal decision in *Morphitis v. Bernasconi* [2003] Ch 552, which dealt with s. 213 of the Insolvency Act 1986 and the Hong Kong Court of Final Appeal decision in *ADS v. Brothers* [2001] 2 BCLC 324 on s. 275(1) of the Companies Ordinance (Cap 32) (both of which provisions are similar to our s. 540) have
H made it clear that the precondition for the exercise of the court's powers is that it should appear to the court "that any business of the company has been carried on with intent to defraud creditors of the company", and not whenever it appears to the court "that any creditor of the company has been defrauded in the course of carrying on the business of the company".

I **[91]** We cannot disagree with this.

[92] It is quite plain from the words of s. 540 that it can only be invoked when the business of the company had been carried on with intent to defraud. This is quite different from saying that it is applicable when an individual creditor has been defrauded in the course of the carrying on of the business of the company.

[93] We should therefore emphasise that in the law on fraudulent trading, *Morphitis v. Bernasconi* (*supra*) stands for the important proposition that it is not sufficient that a creditor has in fact been defrauded in the course of a business. In order to establish a case under s. 540 of the CA 2016, the law requires that the business must have been carried on with intent to defraud. However, if and when this is achieved, the fact that only one creditor has been defrauded, and by a single transaction, is inconsequential.

[94] However – and this is crucial – the defendants before us proceeded to assert that these authorities show that the intent to defraud the creditors must be manifested in the form of the incurring of company debts by those in charge when either they know that they will not be repaid or there is a substantial and unreasonable risk that they will not be.

[95] This forms their main argument in this appeal in that the fraudulent trading alleged by the plaintiff, which concerned the course of conduct *vis-à-vis* the winding up of Mega Planner in 2019, did not involve the company incurring debt (other than the ones created a few years prior).

[96] We do not however think this is at all correct. The accusation was not that the defendants carried on the business of Mega Planner with intent to defraud the plaintiff by incurring company debts knowing they would not be repaid. The incurring of the debt owing to the plaintiff at the earlier point in time is itself not being questioned. What is being challenged by the plaintiff were the various steps later taken to avoid the payment by Mega Planner to the plaintiff of the debt (created earlier).

[97] The defendants' central position appears to be that fraudulent trading under s. 540 is actionable only when the carrying on of the company business with intent to defraud is in a situation where the company incurs debts despite knowing there will be no repayment.

[98] This is not accurate.

[99] Whilst the original fraudulent trading provision in English law had been enacted as a result of proposals to address the situation where a controller of the company purchased goods on credit to fortify a floating charge held by that person at the time he knew the company would not be able to pay for such goods (see the Greene Committee Report on Company Law Amendment, CMND 2657 (1926)), the incurring of debt knowingly without any prospect of repayment is in our view not the only scenario that would attract the provisions of s. 540 of the CA 2016.

[100] Incurring debt in this context may well be the more common, but the essence of the offence is the prohibition against the company defrauding its creditors, which could also include a situation where the business carried on with intent to defraud is not the incurring of new debts (despite knowing it could not be repaid), but also other acts of the company which could cause the avoidance of the payment of the debts (already incurred) to its creditors. It is apposite that we mention again the passage quoted above from the judgment of the Federal Court in *Lai Fee & Anor v. Wong Yu Vee & Ors* (*supra*), where it was held that in the context of carrying on business, the phrase "with intent to defraud creditors" includes an inference of an intent to deprive creditors of an economic advantage or inflict upon them some economic loss (see *Coleman v. The Queen* [1987] 5 ACLC 766). Indeed, in *Lai Fee & Anor v. Wong Yu Vee & Ors* (*supra*), the defendants had utilised a dormant company to acquire a timber logging business from the plaintiffs, having successfully persuaded the plaintiffs to transfer their rights to the business to the defendants notwithstanding that the full purchase price had not been paid to the plaintiffs. The Federal Court, in reversing the decisions of the High Court and the Court of Appeal, held that the defendants had fraudulently induced the plaintiffs to enter into the contract with a dormant company in order to insulate themselves from personal liability for the balance purchase price. The plaintiffs' action for fraudulent trading under s. 540 was successful. As such, the complaint there was not on the creation of debt but the actions taken that achieved the avoidance of the payment of the debt.

[101] Thus, the carrying on of the business with intent to defraud creditors does not necessarily mean simply the incurring of debts known to be incapable of repayment. It also encompasses cases where the business is carried on in the manner of the company undertaking any steps or course of conduct which effect is to avoid and deny debt repayment to its creditors. In other words, the former situation focuses on the actual incurrence of debt and credit from a creditor (knowing it would not be repaid) (such as in cases including *Dato' Gan Ah Tee & Anor v. Kuan Leo Choon & Ors* [2012] CLJU 734; [2012] 1 LNS 734; [2012] 10 MLJ 706, *Re William C Leitch Bros Ltd (No 1)* [1932] 2 Ch 71, *R v. Grantham* [1984] 3 All ER 166, *Siow Yoon Keong v. H Rosen Engineering BV* [2003] 4 CLJ 68; [2003] 4 MLJ 569 and *Chin Chee Keong* (*supra*)), whilst the latter concerns more with the avoidance of the repayment of the debt to the creditors (such as in *Lai Fee & Anor v. Wong Yu Vee & Ors* (*supra*), *Lama Tile* (*Timur*) (*supra*), *Tradewinds Properties* (*supra*) and *Tetuan Sulaiman & Taye* (*supra*)). The distinction may be a fine one when the factual matrix of each case is thoroughly examined and in most cases, it may not really exist nor truly matter as both scenarios form the essence of the same prohibition embodied in the element of the carrying of business "with intent to defraud creditors" proscribed under s. 540 of the CA 2016.

[102] No less significantly, in addition, the contention of the defendants on the point about the necessity of showing debts being incurred to sustain a claim under s. 540 is in fact flatly contrary to the language of the provision itself. We reiterate that the first part of s. 540(1) reads:

> If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud the creditors of the company or creditors of any other person **or for any fraudulent purpose** … (emphasis added)

[103] Thus, the provision is concerned with three different practices. The carrying on of the business of the company has to be any one of the three – first, with intent to defraud the creditors of the company or secondly, with intent to defraud the creditors of any person, or thirdly, for any fraudulent purpose. As stated above, the Federal Court in *Lai Fee & Anor v. Wong Yu Vee & Ors* (*supra*) already held that these three are to be read disjunctively. And as for this third-mentioned "any fraudulent purpose", the English Court of Appeal in *R v. Kemp* [1988] 1 QB 645 held that the mischief of s. 332 of the Companies Act 1948 (predecessor to s. 213 of the Insolvency Act 1986, and in *pari materia* with our s. 540) includes the phrase "carrying on of the business of the company for any fraudulent purpose", which words are sufficiently wide to include customers of that company. The argument that the words "any fraudulent purpose" should be construed *ejusdem generis* with "intent to defraud creditors" was rejected. In other words, the element of "any fraudulent purpose" as found in s. 540(1) is not limited to fraud against creditors, but may also extend to customers of the company.

[104] It is as such not a pre-condition of finding the relevant intent to defraud that there has been an incurring of credit. The obtaining of credit may be relevant, but it is strictly not a requirement of liability under s. 540, which extends to any persons who are victims of the fraudulent behaviour, which concept in the context of the provision is not confined to the fraudulent obtaining of credit.

[105] We emphasise that the grievance of the plaintiff is that the defendants were complicit in carrying on the business of the company with intent to defraud the plaintiff by orchestrating the commencement of the suit by Dakota Engineering against Mega Planner (both ultimately controlled by the defendants), the non-contest of the suit by Mega Planner which resulted in a judgment in default against the company, and the subsequent winding up of the company on the basis of the petition by Dakota Engineering (also not resisted by Mega Planner) founded on the said default judgment, which therefore successfully avoided the payment of debt owing by Mega Planner to the plaintiff.

[106] The essence of s. 540 of the CA 2016 to the instant case is to provide redress to a creditor, like the plaintiff herein, who, as a result of fraudulent trading, is denied of its rightful entitlement for repayment of debt owing by the company. There is no necessity that the intent to defraud must involve the company incurring new debt.

Whether The Plaintiff Should Have Pleaded Fraudulent Trading Was Committed In 2012 When Debt Was Incurred

[107] Relevant to the preceding point raised by the defendants, they also contended that the plaintiff did not plead that back in 2012, when the plaintiff was appointed to carry out the substructure works in the development, or 16 months later, when both the plaintiff and Mega Planner entered into the mutual termination, the business of Mega Planner had been carried on with intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose. We understand that implicit in this argument is that it was at this earlier point in time that the indebtedness was created by the company, with the plaintiff as the creditor.

[108] We do not accept this assertion. This is because there was no reason for the plaintiff to have raised a complaint in 2012 when the plaintiff only discovered the defendants' common control of Mega Planner and Dakota Engineering much later, which was after the plaintiff in Suit 51 obtained the JID against Mega Planner on 12 December 2019, which triggered the application of s. 540 to begin with.

[109] The absence of this knowledge is also the reason why the plaintiff did not pursue its claim against Mega Planner immediately after 5 December 2013 (the mutual termination) but only commenced the same after five and half years, some six months before the statutory limitation set in. It bears emphasis that Mega Planner had been operating and carrying on business until the presentation of the winding up petition in 2019 by Dakota Engineering, and the winding up order was granted by the High Court on 14 May 2019.

[110] In any event, this submission by the defendants is predicated on their stance that the fraudulent trading must involve the incurring of credit, knowing it would not be repaid – hence the focus on the point in time when the debt was incurred instead of the winding up process. This understanding of the law has already been shown above to be erroneous.

Whether There Was Intention To Defraud

[111] The pivotal question must therefore be whether the business of the company is carried on with intent to defraud. The element of intention to defraud must be shown to exist in the carrying on of that business. It is noteworthy that s. 540(1) also states that a person who is knowingly a party to the carrying on the business "in that manner" who is to be made responsible.

[112] As stated by the Federal Court in *Lai Fee & Anor v. Wong Yu Vee & Ors* (*supra*), the word 'intent' is being used in the sense that a man must be taken to intend the natural or foreseen consequences of his act, and that of 'fraud', as defined under s. 17 of the Contracts Act 1950 includes "certain acts which are committed with intent to induce another party to enter into a contract". A B

[113] Further, whether there was any intention on the part of the defendants to defraud or to carry on any fraudulent purpose is a question of fact to be inferred from the surrounding circumstances and the subsequent conduct of the defendants, but fraud must mean actual fraud, which must involve dishonesty of some sort. C

[114] At the risk of repetition, and to give further emphasis on the issue discussed earlier, the case of *Lai Fee & Anor v. Wong Yu Vee & Ors* (*supra*) affirmed that in the context of carrying on business, the phrase "with intent to defraud creditors" is in general a proper inference that the company is carrying on business with intent to defraud the creditors of the company if the company continues to carry on business to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, but that, as highlighted above, it has also been interpreted to include an intent to deprive creditors of an economic advantage or inflict upon them some economic loss. D E

[115] In *Dato' Gan Ah Tee & Anor v. Kuan Leo Choon & Ors* [2012] CLJU 734; [2012] 1 LNS 734; [2012] 10 MLJ 706, fraud was inferred where the directors were aware of an arbitration award and court proceedings against the company but nevertheless approved the payment of dividends which meant that there would not have been sufficient funds left to satisfy the award which in turn would risk the company insolvent, with the result of non-payments to its creditors. F

[116] Further, in *Re William C Leitch Bros Ltd (No 1)* [1932] 2 Ch 71, fraud was also inferred where a company continued to incur debts despite the directors knowing of no reasonable prospect of the creditors ever receiving payment of those debts. And in *R v. Grantham* [1984] 3 All ER 166, fraud was inferred in a situation where further credit was secured for the company as the person concerned knew that funds would not become available to the company to pay the debts when it became due, or soon after. G H

[117] This was not unlike the situation in *Chin Chee Keong* (*supra*), where despite knowing of the company's inability to pay for its purchases, the company, under the directions of its two defendant directors, proceeded to place unusually large orders of raw materials from the plaintiff creditor during the material period. I

[118] Whilst the above cases demonstrate the creation of new credit, the case of *Tradewinds Properties* (*supra*) is more like the present before us, where there, fraudulent trading under the former s. 304 of the CA 1965 was established given evidence that the business was assigned to another company, leaving the assigning company dormant with no ability to pay what it had to, thus achieving the evasion of debt payment due to the creditor. Apart from the case of *Lai Fee & Anor v. Wong Yu Vee & Ors* (*supra*), the facts in *Lama Tile (Timur)* (*supra*) are not too dissimilar to those in *Tradewinds Properties* (*supra*), where the name of the subject company was changed and its business transferred to another entity to avoid the responsibility to pay the outstanding debt.

[119] It is therefore, we reiterate, not necessary, despite the argument of the defendants, that in the context of s. 540, the carrying on of the business with intent to defraud be in the form only of incurring company debts (with the knowledge that the debts will not be repaid or there is a substantial and unreasonable risk that they will not be). Following the line of the defendants' contention, it was thus submitted that no evidence was led by the plaintiff that at the time the plaintiff was appointed by Mega Planner, that was way back in 3 August 2012, that the defendants were in charge of the business of Mega Planner.

[120] This, we must stress is not a correct appreciation of the true remit of s. 540, because, as we have taken pains to clarify above, incurring company debts knowing they cannot be repaid is only one example (*albeit* probably the more common) of a premise from which fraudulent trading against creditors may be inferred. We further venture to add that in respect of such course of conduct of the defendants (involving Mega Planner and Dakota Engineering, which included various acts such as the institution of the suit which led to the JID which was then used to petition for the winding up of Mega Planner, and where Mega Planner did not resist both the suit and the petition, and the subsequent attempt by Dakota Engineering to intervene in the application by the plaintiff for consent to commence a suit against Mega Planner), we find that for all intents and purposes, the same clearly falls within the remit of this element of "with intent to defraud", consistent with the pronouncement made by the Federal Court in *Lai Fee & Anor v. Wong Yu Vee & Ors* (*supra*), as set out above. This also includes that firstly, the requisite intention to defraud is to be inferred from the surrounding circumstances and the subsequent conduct of the defendants, and that secondly, in any event a single act of doing business to defraud a creditor would already be sufficient to trigger the action under s. 540 of the CA 2016.

[121] Deliberately, orchestrating the JID and winding up petition against Mega Planner, both uncontested by Mega Planner, would in our judgment fall squarely within the scope of the essence of fraudulent trading which is the deprivation of an economic advantage from any creditor or the infliction upon the creditor of an economic loss.

Whether "Intent To Defraud" Must Show Dishonesty

[122] As mentioned above, for the purpose of establishing an "intent to defraud" creditors, it has also been held by the Federal Court in *Dato' Prem Krishna Sahgal v. Muniandy Nadasan & Ors* [2017] 10 CLJ 385; [2018] 2 MLJ 693 that the element of dishonesty is an essential ingredient (even though it is not mentioned in s. 540). The element of intent to defraud requires actual dishonesty on the part of those carrying on such business. There must be actual dishonesty involving real moral blame (*Re Patrick And Lyon Limited* [1933] Ch 786).

[123] This again is a question of fact which must be ascertained from a consideration of all relevant circumstances. The Court of Appeal in *Tradewinds Properties* (*supra*) elaborated, as referred approvingly by the Federal Court in *Lai Fee & Anor v. Wong Yu Vee & Ors* (*supra*), that in order to establish dishonesty in the context of this statutory provision, the court should find that what was done was dishonest, according to the ordinary standard of reasonable and honest people and that the persons in default too must have realised that the act was by those standards dishonest.

[124] We cannot stress enough that fraudulent trading against creditors of the company under s. 540 of the CA concerns not just fraud involving the incurring of debts knowing they could not be repaid such as in *R v. Grantham* (*supra*)) and *Chin Chee Keong* (*supra*) but as the cases have more than amply shown, also fraud in the avoidance of the payments of such debts such as in *Tradewinds Properties* (*supra*), and more particularly, the instant case before us. These are all part of the rubric of the fraudulent intention to deprive creditors of an economic advantage or inflict upon them some economic loss, as stated earlier (see *Coleman v. The Queen* (*supra*)).

[125] Other examples of fraudulent trading include where payments were made to other creditors except the plaintiff (see *Tetuan Sulaiman & Taye* (*supra*), where company funds was used to speculate on the stock market, passing on the resulting loss to the company whilst recovering his own funds, causing the company to be insolvent (see *Siow Yoon Keong v. H Rosen Engineering BV* [2003] 4 CLJ 68; [2003] 4 MLJ 569) and where a creditor was misled into agreeing to a consent judgment despite the company being incapable of meeting its debts (see *China Idea Development Ltd v. Ooi Kee Liang & Ors And Another Case* [2018] CLJU 1872; [2018] 1 LNS 1872; [2020] 8 MLJ 527).

[126] We are satisfied that the element of intent to defraud – with dishonesty – in s. 540 in this case has been well made out by the plaintiff since in our judgment, the facts of the case before us warrant that the inference be drawn that the business of Mega Planner was carried on with intent to defraud. This is indisputable given that the course of conduct of the defendants concerning the plan and design – which was the manifestation of how the business of

Mega Planner was carried on in this particular context – namely the suit by Dakota Engineering against its 'related' company Mega Planner, the deliberate non-contest by Mega Planner of that suit and the resultant JID obtained against Mega Planner which was the basis of the uncontested winding up petition against Mega Planner. This resulted in the successful winding up of Mega Planner, thus achieving the avoidance of the need by the wound-up Mega Planner to make payment of the JID sum against Mega Planner secured by the plaintiff, a creditor of Mega Planner.

[127] The dishonest intention is evident, as will be further examined below, in the involvement of the defendants who ultimately controlled Dakota Engineering and Mega Planner and with evidence of clear knowledge on the part of the defendants of the consequences of the said plan against the creditors of Mega Planner. Without any doubt, the instant case is crystal-clearly one where the business of the company has been carried on with intent to defraud creditors of the company, as just described, and not one simply where any creditor of the company has been defrauded in the course of carrying on the business of the company. The body of evidence on the involvement of the defendants (as will additionally be further elaborated on below) cannot lead to a conclusion other than that what had taken place was dishonest, according to the ordinary standard of reasonable and honest individuals and that the defendants themselves too have demonstrated their knowledge and realisation that the relevant conduct on their respective parts was by those standards dishonest.

[128] In light of the above, we are satisfied that the High Court was correct in finding that the business of Mega Planner was carried on with intent to defraud its creditors.

Second Element – Whether The Defendants Were Parties To The Carrying On Of The Business Of Mega Planner

Whether Section 540 Requires The Defendant To Hold Managerial Positions In Mega Planner To Be Carrying On Its Business With Intent To Defraud

[129] The defendants claimed that they were not involved in the business of Mega Planner to begin with. This, we state, is not a sound assertion, for a number of reasons.

[130] First, as mentioned above, the Federal Court in *Lai Fee & Anor v. Wong Yu Vee & Ors* (*supra*) held that whilst it must be shown that the person has participated, concurred or taken some positive steps in the carrying on of the company's business in a fraudulent manner, it is not necessary to show proof of his having assumed a controlling or even managerial role over the company's business before he could be said to be a party to the carrying on of it.

[131] Secondly, the Federal Court in *Lai Fee & Anor v. Wong Yu Vee & Ors* (*supra*) also stated, as above, that it is not necessary to show a scheme to defraud in order to trigger the invocation of s. 540 because a single act of doing business to defraud a creditor would be sufficient, and that a business may be found to have been carried out with intent to defraud creditors notwithstanding that only one creditor is shown to have been defrauded, like presently, and by a single transaction (following *Morphitis v. Bernasconi* (*supra*)).

[132] Thirdly, the words "any person who was knowingly a party to the carrying on of the business" appearing in s. 540 of the CA 2016 plainly do not just refer to any director or shadow director of the company, and in *Tradewinds Properties* (*supra*), this court clearly stated thus:

> [24] With regard to "knowingly", it appears that the scope of personal liability in subsection 304(1) of CA 1965 is not restricted just to directors but anyone who is knowingly party to fraudulent trading. (See: *Re Gerald Cooper Chemical Ltd* [1978] 2 All ER 49).

[133] In *Re Augustus Barnett & Son Limited* [1986] BCLC 170, in respect of the similarly worded s. 332 of the Companies Act 1948 (predecessor to s. 213 of the UK Insolvency Act 1986, now s. 993 of the Companies Act 2006), Hoffmann J said:

> The words 'persons ... parties to' may be wide enough to cover outsiders who could not be said to have carried on or even assisted the carrying on of the company's business, but who nevertheless in some way participated in the fraudulent acts …

[134] It is thus not necessary for the defendants to be involved in the managing of the business of Mega Planner for the plaintiff to sustain a case under s. 540 of the CA 2016. However, as will be seen below, the defendants – specifically the first and third defendants were in fact in any event in a controlling position in not only Mega Planner but also Dakota Engineering.

Whether Evidence Shows Defendants Were Involved In The Carrying On The Business Of Mega Planner To Defraud The Plaintiff

[135] In any event, in our judgment, the assertion of their non-involvement in the carrying on of the business of Mega Planner – being, in this context, the course of conduct concerning the winding up of Mega Planner – is not supported by the evidence which points to the reverse.

[136] The primary basis of the plaintiff's grievance is that, as pleaded, Mega Planner and Dakota Engineering are related and that they were both at the material time controlled by the defendants.

[137] We find that from our review of the appeal record and the submissions of the parties that this contention is not without basis.

[138] First, the two companies are 'related' in the sense that Dakota Engineering was said in evidence to be a subsidiary of Mega Planner. Whilst documentary evidence in the form of the requisite company search results issued by the Companies Commission of Malaysia on these two entities do not in fact confirm this, the first, third and sixth defendants did specifically testify to such effect. It was admitted by the first and third defendants in their respective witness statements that Dakota Engineering is the subsidiary of Mega Planner. It was also stated as such by the first and sixth defendants when testifying during cross-examination at trial. In particular, the first defendant confirmed during his cross-examination that Mega Planner and Dakota Engineering are related companies and the latter is the subsidiary of the former. Further, it is in evidence that both these two companies share the same business address.

[139] Secondly, the fact of the two entities' common directorships and shareholders (although not for all of the defendants) is similarly compelling. All the defendants, bar the third, either had in the past served on the Board of Directors of Dakota Engineering or are still serving. The third and first defendants were also during an earlier period, directors of Mega Planner whilst the fourth defendant is a present director.

[140] Thirdly, it is telling that the fourth defendant was a director of both Dakota Engineering and Mega Planner during the time when Dakota Engineering initiated its action against Mega Planner. The fourth defendant had only resigned as a director of Dakota Engineering on 30 November 2018 which was subsequent to Dakota Engineering having obtained the judgment in default against Mega Planner on 27 November 2018.

[141] Fourthly, Dakota Engineering is wholly owned by Temasek Teguh Sdn Bhd which in turn has the first and third defendants as its two largest shareholders, with 65 per cent and 25 per cent stakes respectively, of the entire share capital of Temasek Teguh. The first and third defendants are also its present directors.

[142] Fifthly, as for Mega Planner, its entire share capital is held by three corporate shareholders – Zentrico Sdn Bhd (with 26% stake), Pelantar Segar (M) Sdn Bhd (49%) and Vati Resources Sdn Bhd (25%). The fourth defendant is a present director of Zentrico, whilst the first and second defendants were its former directors. The fourth defendant is also one of its two registered shareholders. As for Pelantar Segar, the second defendant (being the spouse of the first defendant) is a present director whilst the first, second and fourth defendants were its former directors. The second defendant is also one of its two registered shareholders. The third defendant is both a director and shareholder of Vati Resources.

[143] What all these facts mean, we can already conclude, is that Dakota Engineering is clearly owned and controlled by the first and third defendants (through Temasek Teguh), and that Mega Planner too, through the three corporate shareholders, is controlled especially also by the first and third defendants. It is in this context too that we consider that the relevant defendants testified that Dakota Engineering is a subsidiary of Mega Planner. Although inaccurate, this undoubtedly reflects their understanding of the dominant presence of the relationship between the two. Ultimately, however, what matters in this connection is the evidence that the first and third defendants as well as the other defendants controlled both companies. Whether Dakota Engineering is in law a subsidiary of Mega Planner as defined under s. 4 of the CA 2016 is less conclusive in the absence of clear documentary evidence (apart from witness testimony). Nonetheless, in respect of the need to demonstrate that the defendants were parties to the fraudulent trading, we stress that the more pivotal point was them having been involved (if not in control at the same time) in the affairs of Mega Planner. Moreover, in our analysis, we would think that it is more likely that the first and third defendants are substantial shareholders of Mega Planner under s. 136 of the CA 2016, with each having an interest in share (as widely defined in s. 8(4) and (5) of the CA 2016) in not less than 5 per cent of the total voting shares in Mega Planner, by virtue of their control of the three corporate shareholders of Mega Planner, where each of the three holds more than the statutorily specified 20 per cent ownership in Mega Planner.

[144] Now, whilst the plaintiff pleaded that the first to fourth defendants were the ultimate controllers of Mega Planner and Dakota Engineering with the fifth and sixth defendants being their agents, it is clear to us from witness testimony at trial and the relevant company searches that the first and third defendants are the persons controlling the daily affairs of both companies, and the other four are their nominees who allowed themselves to be directors and/or registered shareholders in the relevant companies who had together participated in the fraudulent trading in the course of conduct related to the winding up of Mega Planner to avoid its responsibility to pay the debts to the plaintiff.

[145] The second defendant herself (the spouse of the first defendant) gave evidence that despite holding the position of a director of Pelantar Segar, where she is also a shareholder, she is in fact working as a clerk in the same company.

[146] The fourth defendant, who seems to be a key individual whose name appears in most of the companies, and who as mentioned above was a director of both Dakota Engineering and Mega Planner during the time when Dakota Engineering initiated its action against Mega Planner (and when Mega Planner chose not to contest both the JID against it and the winding up petition), is still a director of Mega Planner as well as a director and

A shareholder of Zentrico. Tellingly, he testified that he is a "peniaga" who sells "kuih" since 2018. It is no less striking that the fourth defendant also testified when cross-examined that he had never heard of Zentrico even though he is a current director and shareholder of Zentrico. On top of that, he also stated that he was not aware of the nature of the business of Zentrico,
B Mega Planner and Dakota Engineering, and had no idea of the transactions and business involving these companies.

[147] As for the fifth defendant, he admitted that despite having served Dakota Engineering from 15 March 2017 to 14 May 2020, he had also worked as a driver for the first, second and third defendants from 2011 to
C 2018.

[148] And the sixth defendant, who has been a director of Dakota Engineering since 30 November 2018, testified that he is presently working in credit administration or as a sale manager at Low Yat Group since July 2019 and before that he did delivery work for a pickup company.

D

[149] In light of the above, the first and third defendants may be regarded as the ultimate controllers of both Dakota Engineering (by virtue of, among others, both being the current directors and shareholders of Temasek Teguh, the corporate shareholder who wholly owns Dakota Engineering) and Mega Planner (by virtue of, among others, the third defendant being both a director
E and shareholder of Vati Resources, the second defendant (the first defendant's spouse) being a director and shareholder of Pelantar Segar and the fourth defendant's involvement in Zentrico) whilst the second, fourth, fifth and sixth defendants are mere agents or nominees of the first and third defendants.

F

[150] The first defendant, despite not registered as holding any position in Mega Planner, even testified that he is in fact a shareholder of Mega Planner and was involved in both companies, even though he is not registered as a member of the company under s. 101 of the CA 2016. It is also not clear what his shareholding is but as we mentioned above, it is likely that based
G on the analysis of the relevant company search results, he is a substantial shareholder under s. 136 of the CA 2016. Nevertheless, that he is a shareholder is also corroborated in the evidence given by the second defendant who is the spouse of the first defendant. The second defendant herself, we repeat, is a registered director and shareholder of Mega Planner's
H 49% shareholder (Pelantar Segar).

[151] On top of all that, the first and third defendants are still the signatories for both Mega Planner and Dakota Engineering even after their resignations from the Boards of both companies. And we must also point out that evidence shows that it was also the first and third defendants who had
I awarded the project on behalf of Mega Planner to the plaintiff and that the plaintiff had previously been dealing with both of them *vis-à-vis* claims of payment of the progress billing of the project.

[152] More, the sixth defendant, who was appointed director of Dakota Engineering on 30 November 2018 and is presently still, gave evidence that he had received instruction from the first defendant to affirm the affidavit to support the intervention application against the plaintiff's leave application to sue the wound-up Mega Planner.

[153] The fifth defendant too clearly stated that the management of the companies, including the decision on the winding up Mega Planner was the call made by the first defendant, with the fifth defendant having no involvement in their management at all.

[154] Given the above, notwithstanding any argument of separate legal personalities and limited liability companies, since the evidence, uncontroverted and overwhelming, has shown that the first and third defendants are the controllers who were involved in managing the affairs of both companies, whilst their nominees had also participated in the fraud by enabling themselves to be the directors (and shareholders) of the relevant companies (and shareholder companies), in accordance with s. 540, the law permits the lifting of the corporate veil of Mega Planner with the consequence that all of them are to be personally responsible for their wrongdoing in commencing the suit against Mega Planner and then by winding up Mega Planner, both deliberately not resisted by Mega Planner, thus enabling Mega Planner to avoid its obligation to pay the debts owed to its creditor, the plaintiff herein.

The Third Element – Whether The Defendants Were Knowingly Parties To The Carrying On The Business Of Mega Planner With Intent To Defraud

[155] We have earlier discussed the first of the two key elements of s. 540 of the CA 2016, which is the requirement that the business of the company is carried on with intent to defraud. The second principal element of s. 540 requires that the defendants were parties to the carrying on of the business in the manner which is with intent to defraud. The third and final key element is that they were knowingly parties to the same, before they could be held liable to the debts of the company, without limitation.

[156] In the above analysis on how the business of Mega Planner was carried on by the defendants with the intent to defraud, we have for all intents and purposes also shown that the defendants must surely have been knowing parties to the carrying of the business in the said manner. In other words, since they were either the main controlling owners of the main entities (particularly Mega Planner) or nominees to the controlling owners, all of them must have had the knowledge of their involvement in the carrying of the business in such manner. In any event, there is no paucity of further evidence that very resoundingly fastens knowledge on all of the defendants, as we shall further add hereunder.

[157] It is useful that we mention again the case of *Tradewinds Properties* (*supra*), where this court made these key statements in respect of the element of "knowingly" and the words "it appears":

> [24] With regard to "knowingly", it appears that the scope of personal liability in subsection 304(1) of CA 1965 is not restricted just to directors but anyone who is knowingly party to fraudulent trading. (See: *Re Gerald Cooper Chemical Ltd* [1978] 2 All ER 49).
>
> [25] The standard of proof in subsection 304(1) of CA 1965 is on balance of probabilities. The term "it appears" is deployed in the subsection. This clearly denotes that a lower standard of proof is required to establish liability under this provision, *ie*, on a balance of probabilities. (See: *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 5 MLRA 191; [2015] 5 MLJ 1; [2015] 7 CLJ 584; [2015] 5 AMR 497; *Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd (supra)*).

[158] And any doubts as to the liability of the four defendants considered as nominees of the other two, given what may appear to be their more ancillary roles must be immediately dispelled because under the law, they are directors in whom statutory and fiduciary duties are vested. Further, under s. 217 of the CA 2016, it is expressly provided that a nominee director shall not subordinate his duty to act in the best interest of the company to his nominator, failing which, on conviction, the nominee director shall be liable to imprisonment for a term not exceeding five years or a fine not exceeding RM3 million or to both.

[159] Additionally, although the Federal Court in *Lai Fee & Anor v. Wong Yu Vee & Ors* (*supra*) did state the general principle that actual knowledge was required before a person could be said to be knowingly a party to the fraudulent transaction carried out by a company, s. 540 of the CA 2016 can be made out even if the details of the fraud are not known, as so held in *Tetuan Sulaiman & Taye* (*supra*), where this court held:

> To be knowingly party to the fraud, the person does not have to know every detail of the fraud or how it is to be perpetrated. It is sufficient if he has a 'blind-eye' or 'Nelsonian knowledge', *ie,* deliberately shutting his eyes to the obvious that fraud was involved.

[160] This is consistent with the decision in *Manifest Shipping Co Limited v. Uni-Polaris Insurance Co Limited (The Star Sea)* [2001] UKHL 1, where the House of Lords held that turning a "blind eye" knowledge was sufficient to found a claim of fraud, whereby such knowledge requires a suspicion (which is firmly grounded and targeted on specific facts) that the relevant facts do exist and a deliberate decision to avoid confirming that they exist.

[161] Given the uncontroverted evidence of these relationships amongst the defendants, and *vis-à-vis* the companies, it is difficult not to find that the defendants were using Dakota Engineering and Mega Planner to wind up the latter, such that the plaintiff had therefore established its case of fraudulent

trading against the defendants under s. 540 of the CA 2016. It is demonstrably clear that the winding-up of Mega Planner by Dakota Engineering and the suit by Dakota Engineering against Mega Planner which preceded it were a plan devised by the defendants as the two companies are related companies (in the sense of being controlled by the first and the third defendants) and the winding-up was premised on the judgment in default entered by Dakota Engineering against Mega Planner.

[162] Apart from what has been detailed out above, the defendants were clearly knowingly parties to this plan, as the first and third defendants, despite not holding the director position in Mega Planner also in fact testified that Mega Planner had decided not to defend the claim initiated by Dakota Engineering because they thought that there were no merits in defending the same.

[163] In the first place, there could be no dispute that Mega Planner owed a debt to the plaintiff. Upon the mutual termination, the plaintiff submitted the final account claim to the quantity surveyor (QS) for valuation on 12 April 2014, which was subsequently reviewed and sent by the QS on 28 October 2014 to Mega Planner, for the attention of the first defendant. The third defendant too – crucially – when cross-examined testified, that Mega Planner and he were aware that there was already a sum due by Mega Planner to the plaintiff as early as of 2014. Thus, there was clear knowledge of the debt due to the plaintiff on the part of the defendants.

[164] The statement of final account was finally sent to Mega Planner on 9 January 2019, and with the sum stated as due therein never disputed by Mega Planner. This rightly triggered cls. 26.6 and 30.10 of PAM Contract 2006, which rendered the statement of final account final and conclusive, as also acknowledged by the third defendant.

[165] And as stated earlier, the non-payment led to the plaintiff instituting Suit 51, which secured the JID against Mega Planner on 12 December 2019. Unknown to the plaintiff, however, that other JID had been obtained by Dakota Engineering against Mega Planner earlier on 27 November 2018 whilst the petition to wind up Mega Planner was filed on 22 February 2019 shortly after the endorsement of the final account on 9 January 2019.

[166] Delving deeper into the judgment in default first obtained by Dakota Engineering against Mega Planner on 27 November 2018, we observe that there was no evidence such as any letter of award or any other proof to show that Mega Planner was actually owing the sum of RM5,890,724.10 to Dakota Engineering to justify the claim by Dakota Engineering against Mega Planner. In fact, even the statement of claim dated 3 October 2018 filed by Dakota Engineering in its suit against Mega Planner was lacking in particulars of the sum said to be due from Mega Planner.

[167] This further makes Dakota Engineering's case against Mega Planner less than convincing. In fact, the first defendant testified that he did possess the relevant documents on the said claim sum and was aware of the claim, but no explanation was given as to why such documents were not tendered in this trial. Further, despite the claim having been initiated in 2018, the financial report of Dakota Engineering for year 2018 did not capture any debts due from the customers on contracts and also there was no expenses for any construction works captured in the financial report of Dakota Engineering for year 2017 despite the first defendant's testimony that the project was completed around 2016 or 2017.

[168] We find that the High Court had as such correctly drawn an adverse inference under s. 114(g) of the Evidence Act 1950 against the defendants for failing to tender evidence to demonstrate the genuineness of Dakota Engineering's claim against Mega Planner.

[169] The fraudulent nature of this plan and the defendants' knowing involvement in the same is further made clearer since even if the debts claimed to be due to Dakota Engineering from Mega Planner was true, official records showed that Mega Planner in fact still then had the financial means to pay the same. Based on the financial information of Mega Planner for year 2017 as recorded and exhibited in the company search printout, Mega Planner was stated to have current assets in the sum of RM12,563,639 and registered profit after tax of RM7,014,381.

[170] Now, the first defendant too agreed that even with RM6 million in debts, Mega Planner would not have encountered financial difficulties. This further bolsters the plaintiff's case that there was really no good reason for Dakota Engineering to wind up Mega Planner by using the alleged debt of RM5,952,052.19 if not to defraud the creditors of Mega Planner so as to avoid payment of debts to the creditors, the plaintiff included.

[171] The second defendant too, when asked, testified that once the company was wound up, the company would not need to pay any debts to the creditors, unmistakably reflecting her understanding of the matter.

[172] And neither could any of the fourth, fifth or sixth defendants argue not to be in the know, for all three had duly affirmed the relevant statutory declarations for the financial statements of both Dakota Engineering and Mega Planner during the material period.

[173] We are as such satisfied that there is sufficient evidence to demonstrate that each of the individual defendants had the requisite knowledge in that they each knew or had at least turned a blind eye that in the execution of the orchestration of the winding up of Mega Planner, the business of the company was being carried on with intent to defraud its creditors.

[174] It should be emphasised that the law only requires a lower degree of proof to prove fraudulent conduct in the context of s. 540 of the CA 2016, which is on a balance of probabilities. This court in *Lama Tile (Timur)* (*supra*) said:

> [25] The Court of Appeal in *Siow Yoon Keong v. H Rosen Engineering BV*, supra, has also clarified that within the context of s. 304, a lower degree of proof is required to prove the fraudulent conduct: "Note that the section only uses the "if it appears" which indicates a lower degree of proof is required" (p 80 of the Report). See also *LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors* [2009] 5 MLRH 39; [2010]; 1 MLJ 185; [2010] 4 CLJ 849, where the Court also held that a lower degree of proof was required, and it is necessary only to prove an "intention" to defraud.

[175] Still, further evidence of dishonesty on the part of the defendants, and them being knowingly parties to the carrying on of the business of Mega Planner with intent to defraud *vis-à-vis* the orchestration of the JID and winding up order against Mega Planner may be found in their attempt to intervene in the plaintiff's leave application to proceed with legal action against Mega Planner after the plaintiff discovered that Mega Planner had been wound up. The defendants here tried to use Dakota Engineering (which they control) to file an intervener application when there was no good reason as to why Dakota Engineering would be concerned so as to intervene in the plaintiff's leave to proceed against Mega Planner. Dakota Engineering's conduct in this regard was more consistent with an attempt to ensure the frustration of the plaintiff's pursuit of its claim against Mega Planner.

[176] For completeness, we also state that neither does s. 540 requires that in order to establish fraud, the creditors must in fact be defrauded. An intention to defraud is sufficient, and by this, it is meant, we reiterate, an intent to deprive creditors of an economic advantage or inflict upon them some economic loss. At the same time, it is also not necessary to show that the persons in default or the defendants in this case benefitted from the fraudulent trading they had committed. In the instant case, there cannot be any dispute that the plaintiff was denied of the payment of the debt due from Mega Planner. The intention to defraud and the fact of the plaintiff being defrauded are both established.

Whether Plaintiff Was A Creditor Of Mega Planner

[177] It is also imperative that a plaintiff must establish that at the material time of the commission of the fraudulent trading in the sense that when the business of Mega Planner was being carried on with intent to defraud, the plaintiff was a creditor of Mega Planner. In s. 217 of the CA 1965 (in *pari materia* with s. 464 of the CA 2016) on who may file a petition to wind up a company, it is stated that the term "creditor" (now in s. 464(1)(b)) of the CA 2016 includes "contingent or prospective creditor".

[178] The Federal Court in *Dato' Prem Krishna Sahgal* (*supra*) ruled that the word 'creditor' in s. 304 (now s. 540) must be taken to also include 'contingent or prospective creditor' as being used in the former s. 217(1)(b), and that the word 'prospective creditor' refers to a creditor whose claim for debt or right to enforce such claim is expected or likely to happen in future.

[179] We see no reason why the plaintiff was not one. It already had a pecuniary claim against Mega Planner for the remaining payment for work done following the mutual termination in December 2013 (as acknowledged by a number of the defendants, as mentioned above), which the plaintiff could already have enforced its claim as a creditor against Mega Planner by an action of debt without the need to establish a finding of liability (see the High Court decision in *Premium Vegetable Oils Bhd v. ICG Systems Sdn Bhd & Ors* [2006] 7 CLJ 364; [2006] 7 MLJ 39).

[180] Even better for the plaintiff, its claim in this case is in fact and law premised on a judgment in default obtained against Mega Planner, which judgment has never been set aside. In fact, this judgment was even placed in Part A of the common bundle of documents at the trial below – thus its authenticity and contents were agreed to and not disputed.

[181] In light of the analysis and various reasons discussed above, we conclude that the High Court was clearly not plainly wrong in finding that the plaintiff's case of fraudulent trading against the defendants under s. 540 had on a balance of probabilities been established.

Whether The Claim In Tort Of Conspiracy Established

[182] As for the claim of the tort of conspiracy to injure, the elements to establish the same may be found in the following passages from the decision of the Court of Appeal in *Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal* [2016] 3 CLJ 676:

> [10] To appreciate the submissions advanced by learned counsel for the defendants, we think it is relevant to deal with the law of conspiracy which is part of what are known as the "economic torts". There are four elements to a conspiracy claim:
>
> (i) a combination or agreement between two or more individuals;
>
> (ii) an intent to injure;
>
> (iii) pursuant to which combination or agreement, and with that intention, certain acts were carried out; and
>
> (iv) resulting loss and damage to the claimant.
>
> (See *Khoo Teng Chye v. Cekal Berjasa Sdn Bhd & Anor*, Civil Appeal No: P-02-542-03-2015 (CA) [2015] 6 CLJ 449 (CA)).

[11] There are two kinds of conspiracy, the elements of which are distinct:

> (i) unlawful means conspiracy: a conspiracy in which the participants combine to perform acts which are themselves unlawful (under either criminal or civil law); and
>
> (ii) lawful means conspiracy: a combination to perform acts which, although not themselves per se unlawful, are done with the sole predominant purpose of injuring the claimant - it is in the fact of the conspiracy that the unlawfulness resides. (See *Milicent Rosalind Danker & Anor v. Malaysia-Europe Forum Bhd & Ors* [2012] 2 CLJ 1076 (HC); *SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor* [2010] 9 CLJ 389; [2011] 4 MLJ 393 (CA)).

[12] The distinction between the two was succinctly elucidated by Lord Bridge in *Lonrho Plc v. Fayed & Others* [1991] 3 All ER 303 as follows:

> Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.

[183] Therefore, a conspiracy must first basically consist in the agreement of two or more or a combination of efforts by them to do an unlawful act, or to do a lawful act by unlawful means (see *Mulcahy v. R* (1868) LR 3 HL 306).

[184] The tort of lawful means conspiracy and unlawful means conspiracy both require evidence of an agreement or a combination of efforts between two or more parties like the defendants herein who take concerted action that caused injury to the claimant plaintiff.

Whether There Was Agreement/Combination

[185] In the instant case before us, evidence in respect of the claim under s. 540 of the CA 2016 has clearly shown that the defendants had conspired with each other to injure the plaintiff. It was an understanding if not an agreement amongst all that the second, fourth, fifth and sixth defendants, for all intents and purposes, acted according to the directions of the first and third defendants. These two were the mastermind behind the plan to wind up Mega Planner and, together with the other four, were knowingly parties to such carrying on of the business of Mega Planner by the course of conduct concerning the winding up process as the four had also allowed their names to be used to achieve the plan to wind up Mega Planner.

[186] We repeat that the fourth, fifth and sixth defendants admitted during cross-examination that they were aware of their duties as directors, but they still allowed their names to be used by the two in the execution of the plan. As such, we are of the view that the element of an agreement amongst the defendants to conspire was correctly found by the High Court to have been established.

[187] We should add that in any event, in relation to the element for the agreement among conspirators, the agreement need not be expressed and may be inferred from overt acts, where several parties take steps towards one collective purpose, and where the participation in a conspiracy may be active or passive (see *R v. Siracusa* [1990] 90 Cr App Rep 340 and *The King And The Attorney-General Of The Commonwealth v. Associated Northern Collieries & Ors* [1911] 14 CLR 387). In any event, even if the argument is that there was no agreement, clearly here the defendants had met the element of the existence of a combination of the various efforts of the defendants in the pursuit of the conspiracy.

[188] We have also earlier shown that the defendants ought to be liable under s. 540 because there is more than sufficient evidence to prove that they have conspired with each other and created and executed the plan to injure the plaintiff by avoiding responsibility to repay debts to the plaintiff principally by employing Dakota Engineering to initiate a court action against Mega Planner, thereafter entering the JID against Mega Planner, again using Dakota Engineering to present the winding up petition on the basis of that JID (which validity remain unverified and despite Mega Planner having the means to pay it off), and especially ensuring that Mega Planner did not defend both the court action and the winding up petition by Dakota Engineering against itself (Mega Planner). The defendants also used Dakota Engineering to attempt to intervene, without valid reasons, when the plaintiff applied for the court's leave to commence legal action against Mega Planner, with a view to further frustrating the plaintiff's claim against Mega Planner.

[189] And it bears emphasis that the second, fourth, fifth and sixth defendants had in the process followed the lead of the first and third defendants and allowed their names to be used to execute and facilitate the plan to wind up Mega Planner.

[190] Plainly, the corporate structure and registered shareholding of Mega Planner and Dakota Engineering were for this purpose used as a mechanism or a sham, and the tenet of separate legal entity abused, in order to avoid the detection of the true masterminds behind the entire charade to injure the plaintiff by denying its right to be paid the debt due to it from Mega Planner.

Whether It Was Lawful Or Unlawful Means Conspiracy

[191] Now, lawful means conspiracy requires that the defendants' predominant or overriding purpose is to cause loss or damage to the claimant but does not necessitate demonstration of any unlawful acts perpetrated by the conspirators or the parties to the agreement or in any combination thereof.

[192] In contrast, the distinct element of unlawful means conspiracy is that the defendants employ unlawful means in pursuit of their objective.

[193] As for unlawful means conspiracy, two additional elements must be considered. These are, first, the necessity to show an intention to injure, but not that it must be the sole or predominant purpose to do so. Thus, it could just be one of the purposes of the agreement (see *Lonrho Plc v. Fayed* [1992] 1 AC 448). Once the use of unlawful means is established, it suffices if the injury to the claimant is one of their intended purposes. The second is that there is no necessity for the unlawful means to be independently actionable at the suit of the claimant (see the House of Lords decision in *Total Network SL v. HM Revenue And Customs* [2008] 2 All ER 413). Thus, both crimes and civil wrongs can constitute unlawful means.

[194] In the case before us, the plaintiff pleaded its claim of conspiracy to injure against the defendants in the following manner:

> (b) satu deklarasi bahawa Defendan-Defendan secara bersesama dan/atau berasingan telah berkonspirasi dan/atau bergabung bersama secara salah dan dengan niat untuk mencederakan Plaintif *melalui cara yang menyalahi undang-undang an/atau secara alternatif, dengan niat utama atau sebahagian besarnya untuk mengakibatkan kerugian* kepada Plaintif dengan mengatur penggulungan Mega Planner Jaya Sdn Bhd melalui Mahkamah Tinggi Shah Alam Petisyen Penggulungan Syarikat No. BA-28NCC-97-02/2019; (emphasis added)

[195] In our view, the alternatives pleaded by the plaintiff above draw the distinction between what the plaintiff first referred to an unlawful means conspiracy or secondly, the lawful means conspiracy where the injury to the plaintiff must be the predominant objective. The plaintiff therefore pleaded both.

[196] We are minded to hold, contrary to the finding of the High Court, that the facts in the instant case show exactly the latter – lawful means conspiracy, since whilst the prime aim was undoubtedly to deny recovery of the debt otherwise due to the plaintiff, the means employed by the defendants was, it can be said, to have been essentially lawful, such as pursuing the action to secure the JID, and resorting to the winding up process, all of which are steps or courses of action which are features of court proceedings that cannot be construed, at least on the face of it, as unlawful.

[197] This may be contrasted with the facts in the case of *Yong Toi Mee & Anor v. Malpac Holdings Bhd & Ors* [2018] 5 CLJ 619, where the High Court ruled that the continual re-litigation of the issues which were manifestly already *res judicata* was an unlawful means employed by the defendants in the tort of conspiracy to injure as the defendants could not have believed that they had a lawful right to continually litigate matters which had been expressly adjudicated on, when the defendants were actuated by their refusal to accept the judgment of the court.

[198] We are as such satisfied that in this instant appeal before us, the predominant objective of the agreement in the aforesaid conspiracy was to injure the interest of the plaintiffs, given especially the evidence on the pursuit of the JID in the winding up of Mega Planner, ensuring they were not resisted, including later attempting to intervene in the plaintiff's application for leave to take action against the wound-up Mega Planner, all with the knowledge of the defendants of the consequences of such course of action, as mentioned earlier. All these, point inescapably to the presence of the intention to cause harm to the plaintiff as the main or predominant, if not sole reason for the conspiracy.

[199] Similarly, any argument that the decisions taken by the directors amongst the defendants to have been in the nature of business judgment and therefore protected is misconceived. They could not pass muster the requirements of s. 214 of the CA 2016 that the decisions concerning the JID and the winding up process and matters related thereto were made in good faith, for proper purpose, in the reasonable belief that they were appropriate and in the best interest of Mega Planner, and without any personal interest in the decisions, in order to benefit from the protection of the said statutory provision.

Whether The Conspiracy Injured The Plaintiff

[200] As for the requirement for the plaintiff to have suffered loss and damage as a result of the conspiracy, we find this to have also been established. The plaintiff was owed a sum of money by Mega Planner. The plaintiff pursued its claim in court and succeeded in obtaining a JID against Mega Planner. However, the plaintiff has not been able to achieve justice in getting paid by Mega Planner, and remains in its pursuit of the claim by instituting action against the true controlling parties of Mega Planners, who are also in control of Dakota Engineering, and the other conspirators. The injury and loss to the plaintiff, still a creditor of Mega Planner, is as such cannot be denied or subject to real challenge.

[201] The conspiracy cannot, under any legitimate circumstances, be justified by reason that the injury to the plaintiff is a mere collateral consequence to the higher objective of the preserving and furthering the interest of another party such as Dakota Engineering. We say that this

reasoning, even if it was a valid principle (which we seriously doubt) cannot at any rate apply to the instant case. This is because the furtherance of the interest of another party here would not be that of Dakota Engineering, but that of the defendants instead. The only true rival and competing interests here are between that of the plaintiff and that of the defendants. Not Mega Planner, nor Dakota Engineering for as has been shown earlier these companies are everything but separate legal entities which are vehicles controlled by the defendants to further their own interests.

[202] Nevertheless, since in our view, the plaintiff did not very clearly or comprehensively submit to make its case of conspiracy against the defendants, in the sense that it did not argue how each of the elements of the said tort is satisfied, it is not entirely untrue to say that the facts of the case could also satisfy the test for it to be an unlawful means conspiracy. This is in the sense that the defendants were utilising Mega Planner and Dakota Engineering as the device in the court process *vis-à-vis* the plan to avoid repayment of debts due to the plaintiff.

[203] We need not say any more than state that the concept of unlawful means in this tort of conspiracy admits of a wide scope. The following words of Lord Nicholls in *OBG Ltd & Ors v. Allan* [2007] UKHL 21 are most apt:

> So understood, the concept of "unlawful means" stretches far and wide. It covers common law torts, statutory torts, crimes, breaches of contract, breaches of trust and equitable obligations, breaches of confidence, and so on.
>
> … In this context, the expression "unlawful means" embraces all acts a defendant is not permitted to do, whether by the civil law or the criminal law.

[204] There is no insurmountable difficulty in showing that the defendants in an unlawful means conspiracy had acted with an intention to injure the plaintiff (unlike the need to establish such intention to injure as the predominant purpose in a lawful means conspiracy). This is because even though the defendants may contend that what they had done was for their own purposes, the element of the intention to injure can nevertheless still be found against them, since a loss to the plaintiff here is the unmistakable opposite to the gain for the defendants, in ensuring avoidance of payment by Mega Planner. We repeat that for unlawful means conspiracy, it is no defence for the defendants to contend that their primary purpose was to further or protect their own interests (which in any event they have not shown).

[205] In light of the above analysis, we accordingly conclude that it certainly cannot be said that the High Court was plainly wrong in its finding of liability against the defendants for the tort of conspiracy to injure the plaintiff.

A **Appeal On Damages**

[206] In allowing the plaintiff's claim, the High Court had also ordered the defendants to pay the plaintiff general damages and exemplary damages to be assessed. This was then pursued by the plaintiff in a separate assessment of damages proceedings, where the plaintiff had sought the sum of
B RM319,280.34 as general damages, consisting of:

(i) RM20,000 as damages for the defendants' conduct in causing the delay for the plaintiff to claim the outstanding sum from Mega Planner;

(ii) RM199,280.34, being the solicitors' costs incurred by the plaintiff; and

C (iii) RM100,000, for financial difficulty and loss of goodwill.

[207] The High Court decided to award general damages of RM269,280.34 and exemplary damages of RM10,000.

[208] The defendants appealed.

D *General Damages Of RM20,000 For The Delay*

[209] In respect of the RM20,000 damages for the delay, the defendants contended that since the plaintiff had obtained judgment with interest as pleaded at the rate of 7.85% on the outstanding sum, the plaintiff ought to
E be precluded from seeking further damages for delay.

[210] Now, as stated by the defendants, the basis of the plaintiff's claim for interest at the rate of 7.85% per annum, *vis-à-vis* the outstanding was pursuant to cl. 30.17 of the PAM contract. This, we should highlight is therefore part of the plaintiff's entitlement under the contract. The RM20,000 award is part
F of special damages, and has nothing to do with the contractual entitlement under the applicable PAM contract. Neither did the defendants show that the PAM contract precludes any further payment for delay should cl. 30.17 be invoked. The argument of the defendants that this award amounted to double jeopardy against the defendants is devoid of merit.

G **[211]** Further, we are in agreement with the High Court that the award of RM20,000 is reasonable and not excessive. There was a delay of close to six years before the plaintiff initiated the claim for the outstanding sum from Mega Planner despite, as stated above, the defendants being aware of the outstanding sum due and owing to the plaintiff since 2014, and
H notwithstanding the first defendant having admitted that Mega Planner had the means to pay the outstanding sum to the plaintiff at the material time. Instead, the defendants later proceeded to pursue the suit and the winding up against Mega Planner, as well subsequently attempted to intervene in the plaintiff's leave application by filing the intervener application to further
I delay, if not totally frustrate the plaintiff's claim against Mega Planner. These actions unjustifiably prolonged the delay to the detriment of the plaintiff. There is therefore no valid reason to interfere with this award.

General Damages Of RM199,280.34 For Solicitors' Cost

[212] The defendants next challenged the RM199,280.34 awarded as solicitors' costs incurred by the plaintiff, contending that out of this RM199,280.34, the sum of RM81,090 constituted legal fees (plus disbursements and service tax) incurred by the plaintiff for the leave and intervener proceedings in the winding-up court, and for the conduct of the action against Mega Planner. This ought to have been pleaded specifically and prayed for as special damages, as it was ascertained before the commencement of the present action. This sum does not qualify as general damages, as general damages are non-pecuniary losses. The defendants thus submitted that the plaintiff failed to plead and pursue this sum as special damages and therefore cannot claim it under the head of general damages.

[213] We disagree.

[214] The situation here is that there was fraudulent trading against the plaintiff and a conspiracy to injure the plaintiff. There are many authorities that hold that in fraud, where the defendant is guilty of a deliberate wrong by inducing the plaintiff to act to his detriment, the objective of payment of damages is to compensate the plaintiff for all the loss he has suffered, whilst in contrast, in contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties (see the Court of Appeal decision in *Yap Boon Hwa v. Kee Wah Soong* [2019] CLJU 1157; [2019] 1 LNS 1157; [2019] MLRAU 289).

[215] It is apposite that we also mention the Federal Court decision in *Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors* [2021] 4 CLJ 821; [2021] 4 MLRA 211, which adopted Denning LJ's often-quoted view expressed in *Lazarus Estates v. Beasley* [1956] 1 All ER 341 at p. 345 that:

> No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything ...

[216] We therefore find the High Court was certainly not wrong in allowing the plaintiff's claim for solicitors' costs for RM199,280.34 since the charges by the solicitors had all been accounted for with supporting documents (see *Yap Boon Hwa v. Kee Wah Soong* [2019] CLJU 1157; [2019] 1 LNS 1157; [2020] 1 MLJ 37).

[217] This court in *Pendaftar Hakmilik Pejabat Tanah Dan Galian Selangor & Anor v. Lau Yong Ying* [2020] 5 CLJ 164; [2020] 4 MLRA 609 upheld the claim for legal fees, having relied on agreement and documentary evidence, and said:

A

> We affirmed the award by the learned judge because the amount had been agreed between the respondent and her lawyer to do the legal work for her. The lawyers' invoices at pp 26-214 clearly show that the invoices were addressed to her which means she has to pay or had paid the amount stated in the invoices.

B **[218]** The plaintiff is as such rightly entitled to claim the solicitors' fees from the defendant as these are the actual expenditure incurred and losses suffered by the plaintiff.

[219] The argument that since the High Court had already awarded the costs of RM50,000 to the plaintiff, the plaintiff should not be entitled to the legal C fees is not tenable. The answer is trite in that legal fees and disbursement do not include costs of the action, as was clearly stated in this court's decision in *MD Biomedical Engineering (M) Sdn Bhd v. Goh Yong Khai* [2021] 6 CLJ 30; [2022] 4 MLRA 44 as follows:

> [26] We are of the considered opinion that the costs of RM5,000 awarded D by the High Court when the plaintiff's application for removal of caveat was allowed by the court on 12 March 2018, is only in respect of the legal costs of that application and does not include the plaintiff's claim for legal fees and disbursements under this originating summons for assessment of damages.

E **[220]** The plaintiff did incur legal fees, with evidential support, to initiate this action to pursue its claim against the defendants for fraudulent trading and conspiracy to injure, inclusive of the legal services to commence proceedings against Mega Planner in the plaintiff's leave application and in having to oppose the intervener application brought by Dakota Engineering. F Instead of getting paid for the debt sum owing by Mega Planner, the defendants had caused the plaintiff to spend much longer time and higher costs to pursue legal actions against Mega Planner and the defendants.

[221] After all, the Federal Court in *Takako Sakao v. Ng Pek Yuen & Anor (No 2)* [2010] 1 CLJ 419; [2009] 3 MLRA 92 made it clear that the discretion G to award costs on an indemnity basis is unfettered. The Federal Court in that case held that:

> [8] Some of the guidelines for an award of indemnity costs were discussed by Millett J (later Lord Millett) in *Macmillan Inc v. Bishopgate Investment Trust Ltd*, 10 December 1993, (unreported):
>
> H
>
> > The power to order taxation on an indemnity basis is not confined to cases which have been brought with an ulterior motive or for an improper purpose. Litigants who conduct their cases in bad faith, or as a personal vendetta, or in an improper or oppressive manner, or who cause costs to be incurred irrationally or out of all proportion as to what is at stake, may also expect to be ordered I to pay costs on an indemnity basis if they lose, and have part of their costs disallowed if they win. Nor are these necessarily the

> only situations where the jurisdiction may be exercised; the discretion is not to be fettered or circumscribed beyond the requirement that taxation on an indemnity basis must be 'appropriate'.
>
> [9] What appears clear is that the discretion to award costs on an indemnity basis is unfettered. All that is required is that it must be an appropriate case warranting an award on that basis …

[222] Otherwise, at the same time, this could result in an unwelcome situation where the defendants were allowed to benefit from their own wrongdoing by not having to compensate the plaintiff, contrary to the trite presumption in law that a party cannot benefit from his own wrong or default (see the House of Lords decision in *New Zealand Shipping Co Ltd v. Société des Ateliers et Chantiers de France* [1919] AC 1).

General Damages Of RM50,000 For Financial Difficulty

[223] It is also on the authority of *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v. Awang Soh Mamat & Ors* [2009] 5 CLJ 1; [2009] 4 MLJ 610 that the High Court awarded RM50,000 to the plaintiff for the suffering which resulted from its financial difficulty, although the plaintiff's claim for loss of goodwill and reputation was rejected as this latter claim was neither pleaded nor evidentially substantiated. In that case, in respect of the granting of such award for financial difficulty, it was by a majority held as follows:

> It is our view that for a claim based on fraud and conspiracy to defraud, the plaintiffs should be entitled to the loss suffered as the result of the deprivation of their income or profit caused by the wrong committed by the defendants after taking into account the foreseeability factor – see para 1138 *Halsbury's Laws of England* (4th Ed), Vol 12. Here the plaintiffs' third witness has given creditable and uncontradicted evidence on how the amount of losses was arrived at and this has been accepted by the High Court. Though each plaintiff was not called to testify on their respective loss, we see no reason for this requirement since in this FELDA scheme all the plaintiffs have agreed to sell their crops to the third defendant and the profits derived therefrom shared collectively by them with the first defendant.

[224] The plaintiff in the case before us managed to satisfy the High Court that it had suffered financial difficulty in facing financial pressure from its subcontractors and suppliers and was unable to pay them.

[225] This is not inconsistent with the decision of the Court of Appeal in *Kris Angsana Sdn Bhd v. Eu Sim Chuan & Anor* [2007] 4 CLJ 293; [2007] 5 MLJ 13, which affirmed the award of RM1,000,000 as part of the general damages for the mental stress and hardship suffered by the respondent where damage to his property due to the tort committed by the appellant had caused severe mental distress and hardship, and consequently the drastic deterioration in the health conditions to one of the respondents. The Court of Appeal in that

A case emphasised that general damages represent losses which are not easily quantifiable, with losses in the category of mental stress, hardships and the like as also falling under the heading of general damages.

[226] We therefore find no reason to interfere with this award of RM50,000.

B *Exemplary Damages Of RM10,000*

[227] The defendants also appealed against the award of RM10,000 for exemplary damages. It was submitted that a party, who is seeking exemplary damages, which is punitive in nature, must set out the facts supporting its claim for the damages in its statement of claim. Here, apart from praying for
C exemplary damages, the plaintiff had not set out the facts in support of its claim for exemplary damages.

[228] We find no basis for this submission of the defendants, as a careful scrutiny of the entirety of the statement of claim of the plaintiff would readily disclose particulars of facts of the conduct of the defendants in their
D involvement in the fraudulent trading and the tort of conspiracy that would justify the award of exemplary damages against them. In our view, the plaintiff had sufficiently pleaded the facts supporting the claim for exemplary damages.

E **[229]** Mohd Zawawi Salleh JCA (as he then was) in *Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal* [2017] CLJU 500; [2017] 1 LNS 500; [2018] 1 MLJ 784 explained the concept of exemplary damages, as follows:

> F [32] Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.
>
> G [33] The exemplary damages or punitive damages - the two terms now regarded as interchangeable - are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a "contumelious disregard" for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive
> H and retributory, and the award may also have an important function in vindicating the rights of the plaintiff. (See *Rookes v. Barnard* [1964] 1 All ER 347; *A B v. Southwest Water Services* [1993] All ER 609 *Broome v. Cassell & Co* [1971] 2 QB 354, *Laksamana Realty Sdn. Bhd. v. Goh Eng Hwa and Another Appeal* [2005] 4 CLJ 871; [2006] 1 MLJ 675).

I **[230]** The case of *Sambaga Valli* (*supra*) further sets out the following considerations in assessing the quantum of exemplary damages:

> [43] … exemplary damages are not intended to compensate the plaintiff and are not recoverable as a matter of right. The amount of the exemplary damages award is left to the judge's discretion and is determined by considering the character of the defendant's misconduct, the nature and extension of the plaintiff's injury and the means of the defendant. The quantum of exemplary damages to be awarded must be appropriate to the wrongdoing inflicted to the parties involved.

[231] In this case before us, we are of the view that the grant of exemplary damages by the High Court is justified. This is so given the conduct of the defendants, as we have outlined above, in respect of matters concerning the orchestration of the winding up of Mega Planner, involving the unwarranted filing of proceedings which tantamount to a blatant scheme to unduly delay, if not totally deny what was rightfully the entitlement of the plaintiff to enjoy (being the debt owing from Mega Planner, as subsequently confirmed in the judgment secured by the plaintiff against Mega Planner).

[232] The defendants' conduct was calculated to result in profit to the defendants in the sense that they could, upon the winding up of Mega Planner, avoid Mega Planner's responsibility (which they controlled or are nominees to the controllers) to pay the debts to which the plaintiff was entitled.

[233] It needs no reminding that fraudulent trading under s. 540 of the CA 2016 is also a criminal offence under sub-s. (5), which if a prosecution is initiated, makes any one or more of the defendants liable on conviction to imprisonment for a term not exceeding ten years, or to a fine of not more than RM1 million, or to both.

[234] In the final analysis, such conduct of the defendants, taken together, we agree with the plaintiff, is also sufficiently outrageous to merit punishment as it is malicious and fraudulent on the part of the defendants. At the same time, for substantially the same reasons, they had also committed the tort of conspiracy to injure the plaintiff as discussed earlier. The defendants, as the tortfeasors, should not be allowed to obtain a benefit or pecuniary advantage from their wrongful conduct.

[235] We would in that regard, apply the principles enunciated in the leading House of Lords decision in *Rookes v. Barnard* [1964] 1 All ER 367, particularly in respect of the second category of situations justifying the grant of exemplary damages – where the conduct of the defendants was calculated to make a profit for themselves which may well exceed the compensation payable to the plaintiff. Neither does this award of exemplary damages infringe the principle in the High Court case of *Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1992] CLJU 7; [1992] 1 LNS 7; [1993] 1 MLJ 443, which calculated the award of exemplary damages at 25% of the award for compensatory damages.

[236] In addition, we wish to state that the approach taken by the High Court was in line with the principles governing the award of damages, as enunciated in a number of cases. We need only refer again to *Kris Angsana* (*supra*), where the Court of Appeal reiterated this trite principle:

> Before proceeding further, it is necessary to state that the underlying object for the assessment of damages is to put an aggrieved party in the same position as he had occupied, prior to the time when the wrong was done on him (see *Dodd Properties (Kent) Ltd & Anor v. Canterbury City Council & Ors* [1980] 1 All ER 928; *Liew Choy Hung v. Shah Alam Properties Sdn Bhd* [1997] 2 MLJ 309). For special damages, losses which are actual, and unavoidable, invariably monetary awards too will be ordered so as to compensate him.

[237] And further, more recently, and no less significantly, this court in *Pendaftar Hakmilik Pejabat Tanah Dan Galian Selangor & Anor v. Lau Yong Ying* [2020] 5 CLJ 164; [2020] 6 MLJ 445 made the salutary reminder that the courts should not so readily interfere in decisions on the assessment of damages, in the following terms:

> [19] It is trite law that an appellate court would be extremely hesitant in interfering with an award for damages made by a lower court. As correctly pointed by the respondent, the House of Lords in *Davies and Another v. Powell Duffryn Associated Collieries Ltd* [1942] 1 All ER 657; [1942] AC 601 (TAB-1, BOA). At p 616, Lord Wright had this to say:
>
> > An Appellate Court is always reluctant to interfere with a finding of the trial Judge on any question of fact, but it is particularly reluctant to interfere with a finding of damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate.

[238] In that regard, the adherence to the observations made by this court in *Sambaga Valli* (*supra*) is most apt:

> [11] Thirdly, the assessment of damages in action in this nature does not admit of fixed rules and mathematical precision, but is a matter left to the sound discretion to the judges. The fairness and reasonableness of the award cannot be subjected to any recognized test or measure by any certain standard. If the award is manifestly inadequate or excessive, or there are indications that the award was influenced by improper considerations or the mistake was too plain, the Appellate Court should not hesitate to remedy the trial court's error. All the courts should do are to award sums which is reasonable, moderate and conventional.

[239] We conclude that the award of damages by the High Court was not made in error and was essentially in the circumstances of the case, sums that was reasonable, moderate and not excessive.

Conclusions

[240] In light of the foregoing analysis and reasons, we find that the decision of the High Court concerning its key findings on the s. 540 of the CA 2016 claim, its determination in respect of the conspiracy to injure, as well as its assessment of damages cannot be justifiably held to be plainly wrong.

[241] As such, we affirm the decision of the High Court and dismiss this appeal.

[242] We also order the defendants to pay costs to the plaintiff.